Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

ROY L. WONDER, et al.,

Petitioners,

v.

LANRIC HYLAND,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether government officials are entitled to qualified immunity from liability for discharging a volunteer when the law creating the First Amendment rights of volunteers was not established at the time of the officials' conduct.

LIST OF ALL PARTIES

The parties to the proceedings in the Ninth Circuit Court of Appeals were petitioners ROY L. WONDER, former Supervising Judge, Juvenile Court, individually and in his official capacity; DANIEL M. HANLON, former Presiding Judge, individually and in his official capacity; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE CITY AND COUNTY OF SAN FRANCISCO; DENNIS SWEENEY, former Chief Probation Officer, individually and in his official capacity; FRED JORDAN, former Chief Probation Officer, individually and in his official capacity; STEPHEN LA PLANTE, former Director, Juvenile Hall, individually and in his official capacity; SAN FRANCISCO JUVENILE PROBATION DEPARTMENT; SAN FRANCISCO JUVENILE PROBATION COMMISSION; and respondent, LANRIC HYLAND.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF ALL PARTIES ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

OPINIONS BELOW 3

JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 7

I. THIS COURT SHOULD GRANT CERTIORARI TO REESTABLISH THAT OFFICIALS ARE ENTITLED TO IMMUNITY FROM LIABILITY WHEN THE LAW CREATING THE RIGHTS OF THE PLAINTIFF WAS NOT ESTABLISHED AT THE TIME OF THE OFFICIALS' CONDUCT .. 7

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Aldrich v. Knab, 858 F.Supp. 1480 (W.D. Wash. 1994) 10

Anderson v. Creighton, 483 U.S. 635 (1987) 1, 7

Anderson v. McCotter, 100 F.3d 723 (10th Cir. 1996) 10

Barts v. Joyner, 865 F.2d 1187 (11th Cir.), *cert. denied*, 493 U.S. 831 (1989) 9

Board of County Commissioners v. Umbehr, 116 S.Ct. 2342 (1996) 9

Brown v. Disciplinary Comm. of Edgarton Volunteer Fire Department, 97 F.3d 969 (7th Cir. 1996) 10

Connick v. Myers, 461 U.S. 138 (1983) 1, 2, 6, 7, 8, 9

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 2, 7, 11

Havekost v. U.S. Dept. of the Navy, 925 F.2d 316 (9th Cir. 1991) 8

Hogan v. Carter, 85 F.3d 1113 (4th Cir. 1996) 9

Hunter v. Bryant, 502 U.S. 224 (1991) 11

Hyland v. Wonder (Hyland I), 972 F.2d 1129 (9th Cir. 1992), *cert. denied*, 508 U.S. 908 (1993) ..... *passim*

Hyland v. Wonder (Hyland II), 127 F.3d 1135 (9th Cir. 1997) 1, 3, 4, 8

Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17 (2d Cir. 1979) 7, 8

Mitchell v. Forsyth, 472 U.S. 511 (1985) 10

Pickering v. Board of Education, 391 U.S. 563 (1968) 1, 2, 6, 7, 8, 9

TABLE OF AUTHORITIES – Continued

Page

Procunier v. Navarette, 434 U.S. 555 (1978) 7, 10

Umbehr v. McClure, 44 F.3d 876 (10th Cir. 1995) 10

Versarge v. Township of Clinton New Jersey, 984 F.2d 1359 (3d Cir. 1993) 10

STATUTES

28 U.S.C. § 1254(1) 3

42 U.S.C. § 1983.....3, 5

U.S. CONSTITUTION

First Amendment.....3, 5, 6, 8, 9

INTRODUCTION

This Court has declared that government officials are entitled to qualified immunity from liability for civil damages as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known; "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Subverting this principle, on October 6, 1997, the Ninth Circuit in *Hyland v. Wonder (Hyland II)*, 127 F.3d 1135 (9th Cir. 1997) held that government officials – including two judges of the San Francisco Superior Court – were not entitled to qualified immunity when they terminated the status of a high-level volunteer for the San Francisco Juvenile Probation Department ("Department") who wrote a memorandum critical of the administration of the Department. The Ninth Circuit so held despite the fact that the district court initially found that the volunteer's position was not even entitled to First Amendment protection under the principles of *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983) ("*Pickering/Connick* analysis"). *See Hyland v. Wonder (Hyland I)*, 972 F.2d 1129 (9th Cir. 1992), *cert. denied*, 508 U.S. 908 (1993).

In *Hyland I*, the Ninth Circuit reversed the grant of summary judgment for Petitioners Roy L. Wonder, *et al.*, ("Petitioners") and held for the first time that volunteering to work for a government official might be a valuable benefit that the government could not deny based on speech. The Ninth Circuit remanded the case for the district court to apply the *Pickering/Connick* analysis. On

remand, Petitioners argued that they were entitled to qualified immunity because, at the time of Petitioners' actions, the law did not clearly establish the First Amendment rights of volunteers. The district court granted qualified immunity to Petitioners.

The Ninth Circuit reversed. In doing so, the Ninth Circuit contravened the settled standards governing qualified immunity: Reasonable officials could not have known in 1989 that Hyland's loss of a high-level volunteer position constituted a deprivation of a valuable government benefit sufficient to trigger the *Pickering/Connick* analysis.

Review of the Ninth Circuit's decision is necessary for this Court to reestablish that government officials are immune from liability when the law creating the rights of the plaintiff was not established at the time of the officials' conduct. Unless this Court reestablishes this principle, Petitioners will have to face trial on Hyland's charges. And as this Court has noted, subjecting government officials to the risks of trial distracts officials from their government duties, inhibits discretionary action and deters able people from public service. *See Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982). Such a result must be avoided. Moreover, immunizing Petitioners from liability does not deprive Hyland of a remedy if on remand, the district court finds that his First Amendment rights were violated; the City and County of San Francisco remains as a defendant in the action.

Petitioners respectfully pray that this Court issue a Writ of Certiorari.

OPINIONS BELOW

The opinion of the Ninth Circuit in *Hyland I* is reported at 972 F.2d 1129 and is reprinted in the Appendix to this Petition at App. 1.

The opinion of the Ninth Circuit in *Hyland II* is reported at 127 F.3d 1135 and is reprinted in the Appendix to this Petition at App. 34.

The opinion of the United States District Court, Northern District of California is unreported and is reprinted in the Appendix to this Petition at App. 66.

JURISDICTION

The Ninth Circuit filed its judgment on June 25, 1997, and its amended judgment on October 6, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 42 U.S.C. section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or

the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The facts relevant to this petition are not in dispute.[1] Beginning in June 1988, Lanric Hyland volunteered as the personal assistant to the Department's then Chief Probation Officer (Sweeney). The Department operates a secure facility for the detention of youths accused of serious crimes. Because Hyland was a convicted felon, Hyland was not eligible for employment by the Department. Hyland hoped that by volunteering he would someday obtain a pardon from the Governor of the State of California and obtain paid employment in the criminal justice field.

As "Special Assistant to the Chief Probation Officer," Hyland worked closely with Sweeney and was privy to sensitive, work-related confidences. In February 1989, Sweeney asked Hyland to draft a confidential performance appraisal of the then Director of Juvenile Hall (La Plante). Hyland prepared an extremely negative appraisal and then asked Sweeney to issue the appraisal and recommend termination of La Plante. Sweeney refused. Hyland then prepared a memorandum to the Superior

[1] The following facts are set forth in *Hyland I* and *II*.

Court judges supervising the Department. The memorandum asserted that La Plante's incompetence caused the many, well-known deficiencies of the Department.[2] The memorandum urged the judges to terminate La Plante.

Hyland showed the memorandum to Sweeney before sending it to the judges. After skimming the memorandum, Sweeney informed Hyland that his volunteer services were no longer desired. Hyland later sent copies of the memorandum to the judges, the Juvenile Justice Commission and the California Youth Authority.

On March 2, 1990, Hyland filed a complaint under 42 U.S.C. sections 1983 and 1985. The complaint alleged, among other things, civil rights violations under the First Amendment. Hyland sought two million dollars in punitive damages against Petitioners.[3]

On October 9, 1990, the Honorable Marilyn Hall Patel of the United States District Court for the Northern District of California dismissed the complaint for failure to state a claim on the ground that because Hyland was a volunteer, his position was not protected by the First Amendment.

On August 21, 1992, the Ninth Circuit reversed. After a detailed analysis, the panel concluded that "the loss of a

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[2] As the court noted in *Hyland I:* "Admittedly, at the time Hyland's memorandum circulated, troubles at Juvenile Hall had already been exposed to the public by the California Youth Authority." 972 F.2d at 1138.

[3] On July 2, 1993, Hyland filed a second amended complaint against Petitioners and the City and County of San Francisco. This Petition for Writ of Certiorari addresses only the complaint against the individual Petitioners.

high-level volunteer position, such as that held by Hyland in the [Department], constitutes a deprivation of a valuable governmental benefit or privilege." *Hyland I*, 972 F.2d at 1136. The panel remanded the First Amendment claims for balancing under *Pickering/Connick*. *Id.* at 1139. On May 17, 1993, this Court denied the Petition for Writ of Certiorari filed by Petitioners. *Wonder v. Hyland*, 508 U.S. 908 (1993) (No. 92-1478).

On remand, the District Court granted Petitioners' motion for summary judgment. The District Court upheld Petitioners' claim of qualified immunity as one of the grounds for its ruling. The District Court reasoned that it was not clearly established until the Ninth Circuit published the opinion in *Hyland I* that government volunteers possessed the same First Amendment protection from dismissal as government employees.

On June 25, 1997, the Ninth Circuit again reversed. The Ninth Circuit held that (1) a reasonable official should have known that the loss of a volunteer position triggered the *Pickering/Connick* analysis and (2) Petitioners failed to show that a reasonable official could have believed that firing Hyland because of his memorandum did not violate his constitutional rights. App. 51.[4] The Ninth Circuit amended its opinion and denied rehearing on October 6, 1997. App. 36-37.

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[4] The Ninth Circuit also took the unusual step of *sua sponte* entering partial summary judgment in favor of Hyland on the unrelated issue of municipal liability. Hyland had not moved for summary judgment on this issue.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO REESTABLISH THAT OFFICIALS ARE ENTITLED TO IMMUNITY FROM LIABILITY WHEN THE LAW CREATING THE RIGHTS OF THE PLAINTIFF WAS NOT ESTABLISHED AT THE TIME OF THE OFFICIALS' CONDUCT

The Ninth Circuit held that a reasonable official should have known that the loss of a high-level volunteer position constituted a deprivation of a valuable government benefit or privilege sufficient to trigger the *Pickering/Connick* analysis. This decision cannot be reconciled with the decisions of this Court that qualified immunity shields government officials from suits for damages against them in their personal capacity as long as their conduct does not violate *clearly established rights* of which a reasonable official would be aware. *See, e.g., Procunier v. Navarette,* 434 U.S. 555, 562 (1978); *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982); *Anderson v. Creighton,* 483 U.S. at 638.

Significantly, before the Ninth Circuit published its decision in *Hyland I,* only one court ever had considered the First Amendment rights of volunteers. In *Janusaitis v. Middlebury Volunteer Fire Dep't,* 607 F.2d 17 (2d Cir. 1979), the court applied the balancing test of *Pickering* to an individual who lost a volunteer firefighter position for complaining about the morale and training of the department. In *Janusaitis,* however, neither the court nor the parties ever raised or considered whether the "opportunity to serve as a volunteer" was a valuable governmental benefit or privilege. Moreover, unlike Hyland, the volunteer in *Janusaitis* had a statutory property interest in

his position. Finally, *Janusaitis* found *no* First Amendment violation because "when a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened . . . . " *Id.* at 27. In both *Hyland I* and *II*, the Ninth Circuit relied on *Janusaitis* to establish the First Amendment rights of volunteers. But, if the Petitioners were to draw any conclusion from *Janusaitis*, it would have been that the First Amendment does *not* entitle a plaintiff whose speech destroys the working relationship with his superior to continue in the working relationship.

The Ninth Circuit also relied on *Havekost v. U.S. Dept. of the Navy*, 925 F.2d 316 (9th Cir. 1991) to support its finding that Hyland's First Amendment rights were clearly established in 1989. In *Havekost*, a licensee grocery bagger who worked for tips at the Navy's commissary circulated a petition among other baggers calling for the discharge of the head bagger. The head bagger then revoked Havekost's license. The Ninth Circuit found applicable the *Pickering/Connick* analysis despite the fact that Havekost was not a salaried employee. *Id.* at 318. *Havekost* was decided in 1991, however, *almost two years after* the events at issue here. Therefore, *Havekost* provides no support for the proposition that the rights that Petitioners are alleged to have violated were "clearly established." As importantly, *Havekost* expressly concluded that the law regarding the applicability of the *Pickering/Connick* analysis outside of the employment context "was simply not sufficiently clear to warrant denying [the head bagger] qualified immunity." *Id.* at 320. Thus, *Havekost* directly contradicts the panel's decision in *Hyland II*.

In 1989, it simply was not clearly established that denying a person the opportunity to *volunteer* violated his constitutional rights. This fact is evident for a number of reasons. First, at the time that the district court issued its decision in *Hyland I*, the district court surveyed the case law and concluded that because Hyland was a volunteer, his position was *not* protected by the First Amendment. Unless Petitioners are held to a higher standard of constitutional scholarship than the district court, Petitioners should have been entitled to qualified immunity. *See Barts v. Joyner*, 865 F.2d 1187, 1193-94 (11th Cir.), *cert. denied*, 493 U.S. 831 (1989) ("We cannot realistically expect that reasonable police officers know more than reasonable judges about the law."); *Hogan v. Carter*, 85 F.3d 1113, 1116, n. 3 (4th Cir. 1996) ("[I]f a reasonable jurist would not have viewed the defendant's action as violative of clearly established law, then it necessarily follows that the reasonable officer likewise would not have viewed that conduct as violative of clearly established law.").

Second, this Court has recognized the uncertainty in the law regarding the application of the *Pickering/Connick* analysis outside of the employment context. Seven years after the events challenged here, this Court granted certiorari to resolve a split among the circuits regarding whether and to what extent *independent contractors* are protected by First Amendment. *Board of County Commissioners v. Umbehr*, 116 S.Ct. 2342 (1996). Surely if it was uncertain in 1996 whether the First Amendment protected a person who had been awarded a significant government contract, it was at least as uncertain seven years earlier whether the First Amendment protected an

individual volunteering his services *in the hope of securing* employment or a government contract.[5]

Finally, *Hyland I* is the leading case on whether the opportunity to serve as a volunteer constitutes the type of government benefit or privilege sufficient to trigger First Amendment scrutiny. *See Anderson v. McCotter,* 100 F.3d 723, 729 (10th Cir. 1996); *Brown v. Disciplinary Comm. of Edgarton Volunteer Fire Department,* 97 F.3d 969, 972 (7th Cir. 1996); *Versarge v. Township of Clinton New Jersey,* 984 F.2d 1359, 1363 (3d Cir. 1993); *Aldrich v. Knab,* 858 F.Supp. 1480, 1494 (W.D. Wash. 1994). Plainly, *Hyland I* set a precedent.

This Court has held that officials are entitled to qualified immunity from liability when the right in question had not yet been established by a precedent setting case. In *Procunier,* 434 U.S. 555, this Court found that prison officials who allegedly interfered with prisoners' outgoing mail were entitled to immunity because at the time in question there was no established First and Fourteenth Amendment right protecting prisoners' outgoing mail privileges. *Id.* at 564. Similarly, in *Mitchell v. Forsyth,* 472 U.S. 511 (1985), this Court found that the former Attorney General who authorized the wiretapping of telephone conversations without obtaining a warrant was entitled to immunity because at the time of the incident it was not clearly established that such wiretaps were unconstitutional. *Id.* at 530.

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[5] Significantly, the Tenth Circuit's decision reviewed by this Court in *Umbehr* granted the individual defendants qualified immunity, "given the uncertainty in this area of law." *Umbehr v. McClure,* 44 F.3d 876, 883 (10th Cir. 1995).

In reversing the district court, the Ninth Circuit "ignores the import of these decisions." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (reversing decision of Ninth Circuit regarding whether Secret Service agents were entitled to qualified immunity from liability for arrest). Apparently, the Ninth Circuit believes that these decisions no longer apply. As a result, Petitioners must face trial on Hyland's charges – the exact result sought to be avoided by the doctrine of qualified immunity. This Court noted in *Harlow* that the very reason for affording government officials qualified immunity for their discretionary actions is to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." 457 U.S. at 818. This Court noted a few of "the general costs of subjecting officials to the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Id.* at 816. Further, in *Hunter*, 502 U.S. at 227, this Court stated: "[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation."

As the present case demonstrates, the Ninth Circuit believes that the rules governing immunity have been abandoned or that the Court of Appeals need not enforce these rules. This Court should grant review to reestablish that government officials should not face liability when the law creating the right alleged to have been violated was not established at the time of the officials' conduct.

CONCLUSION

This Petition for Writ of Certiorari should be granted.

Dated: January 2, 1998

Respectfully submitted,

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Lanric HYLAND, Plaintiff-Appellant,

v.

Roy L. WONDER, Supervising Judge, Juvenile Court, individually and in his official capacity, et alia; Superior Court for the City and County of San Francisco; Dennis Sweeney; Fred Jordan; San Francisco Juvenile Probation Commission; Diane LaPlante; City and County of San Francisco, Defendants-Appellees,

and

Stephen La Plante, Defendant.

No. 90-16796.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 16, 1992.

Decided Aug. 21, 1992.

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Vicki A. Clayton, Deputy City Atty., San Francisco, Cal., for defendants-appellees.

Appeal from the United States District Court for the Northern District of California.

Before TANG, PREGERSON and BOOCHEVER, Circuit Judges.

TANG, Circuit Judge:

Lanric Hyland worked for a lengthy period of time as a volunteer for the San Francisco Juvenile Probation Department. In February 1989, Hyland prepared a memorandum to the judges supervising the San Francisco Juvenile Hall that detailed numerous problems at the Hall and the failings of its director. Hyland's supervisor terminated Hyland's volunteer status and privileges immediately upon learning of the memorandum's existence. Hyland filed suit alleging that his termination constituted impermissible retaliation for protected speech in violation of the First and Fourteenth Amendments to the federal Constitution. The district court dismissed Hyland's complaint for failure to state a claim. Hyland appeals. We affirm in part and reverse in part.

BACKGROUND

The following facts are based on the allegations contained in Hyland's First Amended Complaint. Lanric Hyland was convicted of armed robbery in 1964. Since his release from prison, Hyland has concentrated his energies on developing an expertise in the administration of criminal justice. Hyland aspired to become a deputy chief probation officer in the San Francisco Juvenile Probation Department ("JPD"), a position for which he could qualify only after receiving a pardon from the Governor of California.

In May 1987, Hyland commenced work as an assistant to Dennis Sweeney, the Chief Probation Officer of the JPD. From October to December 1987, Hyland was paid for his work by the Youth Guidance Center Improvement Committee. From January through June 1988, Hyland

received compensation as a non-civil service employee of the City and County of San Francisco. At all remaining times, Hyland served in the JPD as a volunteer. Hyland alleges that, at the beginning of his service, Sweeney both agreed to exert his best efforts to uncover additional sources of compensation for Hyland and promised that Hyland's volunteer status was to continue until he received a pardon.

In June 1988, Stephen La Plante became the Director of Juvenile Hall. Sweeney had actively promoted La Plante for this position. Conditions at Juvenile Hall deteriorated rapidly under La Plante's supervision. The first nine months of La Plante's tenure saw twenty-seven escapes from Juvenile Hall. Assaults on the staff also increased. Meanwhile, the California Youth Authority threatened to sue the JPD if conditions did not improve. La Plante's allegedly unsatisfactory service as Director was a frequent topic of communication between Hyland and Sweeney in late 1988. In January 1989, Hyland assisted Sweeney in the preparation of a highly critical evaluation of La Plante.

In February 1989, frustrated by the lack of change at Juvenile Hall, Hyland drafted a memorandum to Judge Daniel Hanlon, the presiding judge of the Superior Court in San Francisco, Judge Roy Wonder, supervising judge of the Juvenile Court, and Judge Daniel Weinstein, the former supervising judge of the Juvenile Court. The eight-page memorandum documented in detail La Plante's alleged mistakes, failures, and overall incompetence in administering Juvenile Hall. Drawing upon information gleaned from his work experiences, Hyland described the precipitous decline in staff morale, accountability, and

leadership at Juvenile Hall. Hyland also cited problems with the living conditions at Juvenile Hall and the treatment of minors detained there. Hyland concluded that La Plante should be terminated immediately "for the good of the youth and Staff at Juvenile Hall."

Before circulating the memorandum to the judges, Hyland shared it with Sweeney. Immediately upon receiving it, Sweeney allegedly told Hyland: "You have no right to do this. Your relationship with the Juvenile Court is finished. I want your keys [to the Youth Guidance Center] and I'm going to issue a memorandum stating you are not to be allowed into Juvenile Hall ever again."

On February 27, 1989, Hyland delivered his memorandum to the judges and provided copies to the Juvenile Justice Commission and the California Youth Authority.

In March 1989, Hyland obtained a position as a paid consultant to the National Center on Institutions and Alternatives. In June 1989, Judge Wonder informed the National Center on Institutions and Alternatives of Sweeney's ban on Hyland's access to Juvenile Hall. The National Center subsequently advised Hyland that he could not work on cases in the San Francisco Juvenile Court.

In March 1990, Hyland commenced work as a consultant to the County Clerk of San Mateo County charged with reorganizing and automating the functions of the San Mateo Juvenile Court's office.

Hyland alleges that, following his termination, Sweeney told a newspaper reporter "[J]ust ask Hyland why he can't be a peace officer in the State of California." Hyland also alleges that Sweeney threatened to take various measures designed to prevent Hyland from working in the juvenile justice system again. Hyland does not, however, contend that Sweeney actually carried through on these threats. Sweeney and La Plante also wrote letters to the Governor of California withdrawing their support for Hyland's pardon application. Hyland alleges that Sweeney followed-up with a phone call to the Governor in March 1989, demanding that Hyland's pardon be denied because Hyland allegedly had unethically released to the public confidential information from juvenile court files. Hyland's pardon was denied in May 1989.

Hyland also charges Judge Wonder and other officials with failing to stop Sweeney and La Plante from taking steps to exclude Hyland from Juvenile Hall and related employment opportunities.

In March 1990, Hyland initiated pro se an action in federal district court against a variety of defendants, including Sweeney, La Plante, and Judges Wonder and Hanlon (collectively, "the defendants"). The complaint alleges both state and federal claims, including charges that Hyland's termination violated his First Amendment free speech rights and his Fourteenth Amendment right to due process.

After briefing and oral argument, the district court dismissed Hyland's federal action for failure to state a claim, pursuant to Fed.R.Civ.P. 12(b)(6). Specifically, the district court ruled that the complaint failed to articulate

either a property or liberty interest protected by the Due Process Clause. The district court also found that the speech was not protected by the First Amendment, citing *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). The district court then dismissed Hyland's state law claims, without prejudice, for lack of jurisdiction.

Hyland timely noticed his appeal to this court.

STANDARD OF REVIEW

We review de novo the district court's dismissal of Hyland's complaint for failure to state a claim. *Thomas v. Carpenter*, 881 F.2d 828, 829 (9th Cir.1989), *cert. denied*, 494 U.S. 1028, 110 S.Ct. 1475, 108 L.Ed.2d 612 (1990). The dismissal cannot be affirmed " 'unless it appears to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proved.' " *Id.* (quoting *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir.1986)). All material allegations of the complaint are taken as true and are construed in the light most favorable to Hyland. *Id.*

Whether Hyland's speech is protected by the First Amendment and is a matter of "public concern" is a question of constitutional law we review de novo. *See Connick*, 461 U.S. at 148 n. 7, 103 S.Ct. at 1691 n. 7; *Roth v. Veteran's Admin.*, 856 F.2d 1401, 1405 (9th Cir.1988). Whether Hyland's termination impinged upon a protected property or liberty interest is likewise a question of constitutional law that we accord de novo review. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570-78, 92 S.Ct. 2701, 2705-10, 33 L.Ed.2d 548 (1972);

Carreras v. City of Anaheim, 768 F.2d 1039, 1042 n. 2 (9th Cir.1985).

DISCUSSION

I. The First Amendment Claim

Hyland argues that the district court erred in holding that the memorandum he wrote to the judges was not constitutionally protected speech. Hyland and the defendants focus their briefs on the question whether Hyland was a "public employee" entitled to avail himself of Supreme Court decisions insulating employee speech from retribution by superiors. But regardless of whether Hyland was a public employee, the First Amendment constrained the ability of state officials to deprive Hyland of a valuable governmental benefit as punishment for speaking out on a matter of public concern. We therefore reverse the district court's dismissal of Hyland's First Amendment claim.

A. Hyland's Status

The parties belabor the issue of Hyland's status as either a public employee or a volunteer, treating this issue as determinative of Hyland's entitlement to First Amendment protection. In so arguing, the parties fail to recognize the broader constitutional principles animating the Supreme Court's decisions on public employee speech.

The right of public employees to speak on matters of public concern, acknowledged in cases like *Connick v. Myers* is an outgrowth of the constitutional tenet that

public officials may not deny or deprive a person of a governmental benefit or privilege on a basis that infringes her or his freedom of speech. *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2698, 33 L.Ed.2d 570 (1972) ("For at least a quarter-century, this Court has made clear that . . . [government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech."); *see also Connick*, 461 U.S. at 144, 103 S.Ct. at 1688 (" 'the denial of or placing of conditions upon a benefit or privilege' " can violate the First Amendment) (quoting *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965 (1963)); *Havekost v. United States Dep't of the Navy*, 925 F.2d 316, 318 (9th Cir.1991) (recognizing the "broad principle that the government may not deny a person a valuable benefit on a basis that infringes his constitutionally protected interests") (quotation omitted).

The cases thus recognize a variety of public benefits, in addition to public employment, which cannot be denied solely because of the recipient's exercise of constitutional rights. *See, e.g., Rutan v. Republican Party*, 497 U.S. 62, ___, 110 S.Ct. 2729, 2736, 111 L.Ed.2d 52 (1990) (promotion or transfer in a government job); *Shapiro v. Thompson*, 394 U.S. 618, 627 n. 6, 89 S.Ct. 1322, 1327 n. 6, 22 L.Ed.2d 600 (1969) (welfare benefits); *Sherbert*, 374 U.S. at 404-05, 83 S.Ct. at 1794-95 (unemployment benefits); *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958) (tax exemptions); *Thomas*, 881 F.2d at 829-30 (loss of certain job responsibilities).

We have specifically recognized that the rule of *Perry v. Sindermann* and *Connick v. Myers* applies beyond the

employment context. In *Havekost v. United States Dep't of the Navy*, the Navy permitted Havekost to enter the military base and earn tips as a bagger at the commissary. Havekost had no employment contract with the Navy, only "a revocable grant of permission to work for customer tips." 925 F.2d at 317. After Havekost protested the head of the commissary's efforts to regulate baggers, the Navy revoked her permission to enter the base and work. The Ninth Circuit found the *Connick* analysis applicable "even though Havekost was not an employee." *Id.* at 318; *see also Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir.1989) (suspension of petroleum bulk use plant permits violates First Amendment if made in retaliation for speech); *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 511 (9th Cir.1988) (exemptions from import duties); *Bernasconi v. Tempe Elementary Sch. Dist. No. 3*, 548 F.2d 857, 860 (9th Cir.) (unwanted transfer constitutes loss of a "valuable governmental benefit"), *cert. denied*, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 82 (1977).

Thus the relevant question, for purposes of Hyland's First Amendment claim, is not whether Hyland was a public employee, but rather whether the opportunity to serve as a volunteer constitutes the type of governmental benefit or privilege the deprivation of which can trigger First Amendment scrutiny. We hold that it does.

The Supreme Court has instructed that the type of sanction imposed to discourage the exercise of First Amendment rights "need not be particularly great in order to find that rights have been violated." *Elrod v. Burns*, 427 U.S. 347, 359 n. 13, 96 S.Ct. 2673, 2683 n. 13, 49 L.Ed.2d 547 (1976). A person's rights are unconstitutionally infringed "both where the government fines a

person a penny for being a Republican and where it withholds the grant of a penny for the same reason." *Id.; see also Rutan,* 497 U.S. at ___ n. 8, 110 S.Ct. at 2737-38 n. 8 ("[T]he First Amendment . . . already protects state employees not only from patronage dismissals but even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights.") (quotation omitted). The injury to position or privilege necessary to activate the First Amendment thus need not rise to the level of lost employment. Retaliatory actions with less momentous consequences, such as loss of a volunteer position, are equally egregious in the eyes of the Constitution because a person is being punished for engaging in protected speech.

The Second Circuit has held that the First Amendment can protect against the loss of a volunteer position. In *Janusaitis v. Middlebury Volunteer Fire Dep't,* 607 F.2d 17 (2d Cir.1979), the court held that the dismissal of a volunteer firefighter for complaining about low morale and inadequate training and discipline can violate the First Amendment. *Id.* at 25.[1]

Moreover, as a government volunteer, a person gains valuable experience and education in public administration and can make professional contacts. The parties do not dispute that Hyland hoped to develop expertise and knowledge about juvenile justice by volunteering at the

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[1] The court ultimately found no constitutional violation because the manner in which Janusaitis expressed himself was incompatible with the need for a close working relationship and *esprit de corps* between firefighters. 607 F.2d at 25-26.

JPD. The opportunity to serve as a volunteer is also important because it provides an individual the satisfaction of making a contribution, or giving something back, to society. Accordingly, volunteer status, no less than business permits and tax exemptions, is a valuable governmental benefit or privilege that may not be denied on the basis of constitutionally protected speech. We thus agree with the Second Circuit that a volunteer position, like other governmental benefits and privileges, can only be denied in a manner that comports with the First Amendment.

That Hyland had no right, in the first instance, to serve as a volunteer and that he could have been terminated at will does not diminish his First Amendment claim. Indeed, both the Supreme Court and this court have repeatedly and emphatically rejected this argument:

> [T]his Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which [it] could not command directly. Such interference with constitutional rights is impermissible.

Perry, 408 U.S. at 597, 92 S.Ct. at 2697 (citation and quotation omitted); *see also Rutan*, 497 U.S. at ___, 110 S.Ct. at 2735-36 (following *Perry*, the Court "find[s] the assertion here that the employee petitioners had no legal entitlement to promotion, transfer, or recall beside the point"); *Rankin v. McPherson*, 483 U.S. 378, 383-84, 107 S.Ct. 2891, 2896, 97 L.Ed.2d 315 (1987) ("Even though McPherson was merely a probationary employee, and even if she could have been discharged for any reason or for no reason at all, she may nonetheless be entitled to reinstatement if she was discharged for exercising her constitutional right to freedom of expression."); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84, 97 S.Ct. 568, 574, 50 L.Ed.2d 471 (1977) ("Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him . . . , he may nonetheless establish a claim to [relief] if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms."); *McKinley v. City of Eloy*, 705 F.2d 1110, 1116 (9th Cir.1983); *accord Keyishian v. Board of Regents*, 385 U.S. 589, 605-06, 87 S.Ct. 675, 685, 17 L.Ed.2d 629 (1967) ("[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.").

In sum, whether Hyland is labelled a public employee or a volunteer is not determinative of whether Hyland stated a claim of First Amendment infringement. Nor is the at-will nature of his position dispositive. The critical question is simply whether Hyland has alleged the loss of a valuable governmental benefit or privilege in

retaliation for his speech. We conclude that the loss of a high-level volunteer position, such as that held by Hyland in the JPD, constitutes a deprivation of a valuable governmental benefit or privilege.

B. Public Concern

Because Hyland adequately alleged the loss of an important governmental benefit, we must next inquire whether the speech in question was constitutionally protected from retaliation by the government acting in its capacity as an employer/supervisor. The district court concluded that Hyland's memorandum did not speak to a matter of public concern and thus was not protected. We disagree.

In *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), the Supreme Court formulated the "public concern" test in an effort to find a compromise between the rights of public employees to free speech and of the government to regulate its workplace. "The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568, 88 S.Ct. at 1734-35. Under *Pickering*, a dismissal from employment or other loss of a governmental benefit as a consequence of speech does not run afoul of the First Amendment unless the speech addresses a matter of public concern. *Id.* at 572-74, 88 S.Ct. at 1736-38; *see also Connick*, 461 U.S. at 146, 103 S.Ct.

at 1689. Correspondingly, speech focused solely on internal policy and personnel grievances does not implicate the First Amendment.

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.
>
> . . . We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. . . . Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.

Connick, 461 U.S. at 146-47, 103 S.Ct. at 1690 (citation omitted).

Determining whether speech involves a matter of public concern entails an inquiry into the "content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48, 103 S.Ct. at 1690 (footnote omitted); *see also Anderson v. Central Point Sch. Dist. No. 6*, 746 F.2d 505, 507 (9th Cir.1984). If some part of the communication addresses an issue of public concern, the First

Amendment's protections are triggered even though other aspects of the communication do not qualify as a public concern. *See Connick*, 461 U.S. at 149, 103 S.Ct. at 1691. Some inaccuracy in the content of the speech must be tolerated. *See Pickering*, 391 U.S. at 570-72, 88 S.Ct. at 1735-37.

We hold that Hyland's memorandum did discuss a matter of public concern. The memorandum exposed abuses, inefficiency, threats to public safety, potential civil rights violations, and incompetence of public law enforcement officials at Juvenile Hall. Such issues are of vital interest to citizens in evaluating the performance of their government. Moreover, the intersection at Juvenile Hall of the criminal justice system and the special custodial needs of children fuels a heightened concern for openness and public review of governmental operations.

Case law confirms that Hyland's memorandum spoke to a matter of public concern. In *Roth*, we observed that speech regarding "the misuse of public funds, wastefulness, and inefficiency in managing and operating government entities" qualifies as a matter of public concern. 856 F.2d at 1405. Like Hyland, Roth alleged that Veteran's Administration personnel "acted unethically," "mismanaged personnel," "violated safety regulations," and put people "in jeopardy." *Id.* at 1406. We found such issues to be "inherently of interest to the public." *Id.*

Similarly, in *Allen v. Scribner*, 812 F.2d 426 (9th Cir.), *amended*, 828 F.2d 1445 (9th Cir.1987), we held that speech criticizing the "competency of [the Mediterranean Fruit Fly Eradication] Project Management as well as the efficient performance of project duties" constituted a matter

of public concern. Indeed, we observed that "[s]uch allegations are arguably the most fundamental sort of first amendment expression, given the first amendment's role in facilitating self-government." *Id.; see also McKinley,* 705 F.2d at 1114 (speech addressed to "the competency of the police force is surely a matter of great public concern," as is speech revealing "the interrelationship between city management and its employees," "discipline and morale in the work place," and "an agency's efficient performance of its duties") (quotations omitted); *Janusaitis,* 607 F.2d at 18 (volunteer firefighter's report charging low morale and inadequate training and discipline of firefighters is a matter of public concern).

The context in which the memorandum was drafted and circulated belies the defendants' suggestion that Hyland's speech concerned only an internal personnel dispute. Taking the alleged facts in the light most favorable to Hyland, Hyland's speech was not the by-product of a personal employment dispute. The memorandum did not concern Hyland's dissatisfaction with his own position or on-the-job treatment. *See Roth,* 856 F.2d at 1406. Hyland had no personal occupational stake in the dismissal of La Plante. Nor was Hyland's purpose simply "to gather ammunition for another round of controversy with [his] supervisors." *Connick,* 461 U.S. at 148, 103 S.Ct. at 1690. Hyland's memorandum addressed more than a "work place grievance" – Hyland spoke "in order to bring wrongdoing to light . . . [not] merely to further some purely private interest." *Havekost,* 925 F.2d at 318; *cf. Connick,* 461 U.S. at 148, 103 S.Ct. at 1691 (questionnaire not a matter of public concern because, "if released to the public, [it] would convey no information at all other than

the fact that a single employee is upset with the status quo").

While Hyland's memorandum did involve an end-run of his superior, that alone does not suffice to transform the memorandum into a personnel dispute. Pickering's letter to the newspaper was no less a matter of public concern simply because it involved going over the Board of Education and appealing directly to voters. 391 U.S. at 566-69, 88 S.Ct. at 1733-35; *see also Roth*, 856 F.2d at 1404 (criticism "outside the[ ] ranks" remains a matter of public concern). To hold otherwise would deter employees from bringing problems and abuses in a governmental office to the attention of the authorities charged with oversight of that office. Some of the most important public employee speech – exposing governmental corruption, wrongdoing, or incompetence – would be left outside the First Amendment's aegis.

The defendants further contend that the staleness of the information contained in the memorandum warrants denying it First Amendment protection. We reject this argument. Admittedly, at the time Hyland's memorandum circulated, troubles at Juvenile Hall had already been exposed to the public by the California Youth Authority. The defendants do not suggest, however, that the detailed discussion of these problems contained in the Hyland memorandum and the identification of La Plante as the root cause of these troubles was already a matter of public record. Furthermore, general public awareness of an issue does not make all further investigation and in-depth discussion of the matter redundant, superfluous, or devoid of public interest. *See Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 411-16, 99 S.Ct. 693, 694-97, 58

L.Ed.2d 619 (1979) (teacher's complaints about race discrimination at school are a matter of public concern, even though school's discriminatory practices had already been exposed when school became the subject of a federal court's desegregation order).

Finally, the defendants suggest that, because Hyland limited his disclosure to the judges and others charged with supervising the administration of Juvenile Hall rather than exposing his complaints to the public as a whole, the content of the memorandum could not be of concern to the public. The Supreme Court, however, has specifically eschewed such reasoning:

> The First Amendment forbids abridgment of the "freedom of speech." Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment.

Givhan, 439 U.S. at 415-16, 99 S.Ct. at 696-97; *see also Rankin*, 483 U.S. at 386-87 n. 11, 107 S.Ct. at 2899 n. 11 ("The private nature of the statement does not . . . vitiate the status of the statement as addressing a matter of public concern."); *Connick*, 461 U.S. at 149, 103 S.Ct. at 1691 (item on questionnaire circulated only to colleagues still qualifies as a matter of public concern).

Other considerations, moreover, strongly militate in favor of categorizing Hyland's memorandum as a matter of public concern. The memorandum's content addressed a classic topic of public concern – the inept, inefficient,

and potentially harmful administration of a governmental entity. Moreover, while Hyland's memorandum was not widely circulated, it was targeted at those public officials most capable of effecting a change in the administration of Juvenile Hall. Bringing problems to the attention of responsible governmental administrators is at least as important a communication for promoting democratic self-government as disclosure to the citizenry as a whole.

C. Balance

Our conclusion that Hyland adequately alleged the loss of a valuable governmental benefit or privilege in retaliation for his speech on an issue of public concern does not end the constitutional inquiry. Hyland's discharge could still survive First Amendment scrutiny if the defendants show that Hyland's speech so severely damaged office harmony and working relationships that the government's interest in promoting an effective workplace outweighs Hyland's First Amendment rights. *Rankin*, 483 U.S. at 388, 107 S.Ct. at 2899 ("Because McPherson's statement addressed a matter of public concern, . . . we [must] balance McPherson's interest in making her statement against 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' ") (quoting *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-35); *Connick*, 461 U.S. at 150, 103 S.Ct. at 1692 ("The . . . balance requires full consideration of the government's interest in the

effective and efficient fulfillment of its responsibilities to the public."); *see also McKinley*, 705 F.2d at 1115.[2]

Application of this balancing test entails a factual inquiry into such matters as whether the speech (i) impairs discipline or control by superiors, (ii) disrupts co-worker relations, (iii) erodes a close working relationship premised on personal loyalty and confidentiality, (iv) interferes with the speaker's performance of her or his duties, or (v) obstructs the routine operation of the office. *Rankin*, 483 U.S. at 388, 107 S.Ct. at 2899; *Connick*, 461 U.S. at 151-52, 103 S.Ct. at 1692-93; *Roth*, 856 F.2d at 1407; *Bernasconi*, 548 F.2d at 861-62. The "manner, time, and place" in which the speech occurred also constitute relevant considerations. *Connick*, 461 U.S. at 152, 103 S.Ct. at 1693.

The nature of the government's burden to show disruption, moreover, varies with the content of the speech. *Connick*, 461 U.S. at 150, 103 S.Ct. at 1692. The more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made. *Id.* at 150, 152, 103 S.Ct. at 1692, 1693 ("We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern."); *Roth*, 856 F.2d at 1407; *Allen*, 812 F.2d at 432; *see also Bernasconi*, 548 F.2d at 862 ("[T]he plaintiff's right to speak ought to be protected in consonance with the first

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[2] The discharge decision could also be sustained if the defendants proved by a preponderance of the evidence that they would have released Hyland regardless of his speech. *See, e.g., Mt. Healthy*, 429 U.S. at 287, 97 S.Ct. at 576. The defendants, however, do not make such an argument here.

amendment's primary concerns.") (quotation omitted). Furthermore, "actual, material and substantial disruption must be demonstrated." *Roth*, 856 F.2d at 1407; *see also Allen*, 812 F.2d at 432 (disruption must be "real, [and] not imagined.") (quoting *McKinley*, 705 F.2d at 1115). Mere allegations of interference with a working relationship cannot "serve as a pretext for stifling legitimate speech or penalizing public employees for expressing unpopular views." *McKinley*, 705 F.2d at 1115; *see also Allen*, 812 F.2d at 432.

Determining to what extent Hyland's memorandum disrupted office operations thus involves a factual investigation into the nature of Hyland's tasks, the character of his relationship with co-workers and especially with his supervisor Sweeney, and the impact of the memorandum on office relations. We have previously recognized that this balancing inquiry cannot be resolved by this court at such an early stage in the proceedings. *Thomas*, 881 F.2d at 832 (balancing inquiry premature where district court dismissed complaint for failure to state a claim); *see also Roth*, 856 F.2d at 1408 (acknowledging factual nature of the inquiry). Consequently, we remand the case to the district court for resolution of the question whether Hyland's memorandum was sufficiently disruptive to justify his dismissal despite the protected content of the speech.

II. The Due Process Claim

A. Property Interest

The district court held that Hyland failed to state a claim of denial of due process because he lacked an

identifiable property interest in his retention as a volunteer. We affirm this aspect of the district court's decision.

Hyland concedes that his expectation of continued volunteer status does not derive either from statutory authority or a written contract.[3] Hyland relies on an alleged oral and implied promise that he could remain a volunteer until receiving a pardon from the Governor. Hyland's volunteer status, however, does not amount to a constitutionally protected property interest.

The Supreme Court has explained that:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it.

Board of Regents, 408 U.S. at 577, 92 S.Ct. at 2709. The Supreme Court went on to outline the possible sources of such property interests:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id.; see also Roth, 856 F.2d at 1409 ("Entitlements arise from rules or understandings from independent sources,

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[3] California law recognizes the position of a juvenile probation department volunteer. Cal.Welf. & Inst.Code § 842. Nothing in the statute, however, creates any expectation or entitlement to volunteer status.

such as statutes, regulations, and ordinances, or express or implied contracts.") (quotations omitted).

Hyland's allegation of an understanding or implied contract with Sweeney cannot be elevated to the status of a legal entitlement for two reasons. First, an "understanding" must be "mutually explicit" before it can rise to the level of an entitlement. *Roth*, 856 F.2d at 1409. While the alleged understanding or agreement may have reflected Sweeney's and Hyland's expectations, Hyland does not allege that their agreement included an explicit promise that Hyland's volunteer status would not be terminated prior to the pardon. Hyland thus fails to allege a mutually explicit limitation on the JPD's authority to terminate his volunteer position.

Second, even assuming that Sweeney did expressly promise that Hyland's volunteer service could be terminated when, and only when, Hyland received a pardon, that promise was void as contrary to law. Hyland's property interest must be defined consistently with California law. *Guy v. Mohave County*, 701 F.2d 73, 75 (9th Cir.1982). Under California law, the terms and conditions of government service are regulated by statute, not by contract. *Williams v. Los Angeles City Dep't of Water & Power*, 130 Cal.App.3d 677, 181 Cal.Rptr. 868, 870 (1982); *see also* Cal.Welf. & Inst.Code § 271 (county civil service laws define tenure of probation department officials and employees). Temporary, non-civil service employees have no property interest in continued employment, according to California law. *Williams*, 181 Cal.Rptr. at 871.

We have held that promises of continued employment made in direct contravention of applicable law are

insufficient to create a claim of entitlement for purposes of the Due Process Clause. In *Bollow v. Federal Reserve Bank*, 650 F.2d 1093 (9th Cir.1981), *cert. denied*, 455 U.S. 948, 102 S.Ct. 1449, 71 L.Ed.2d 662 (1982), we ruled that a promise of employment security made by a bank officer did not create an enforceable property interest because the Federal Reserve Act of 1913 established the at-will status of employees. *Id.* at 1099. We declared the promise void and concluded that "[a] void contract is clearly insufficient to support a claim of entitlement to government employment." *Id.*; *see also Davis v. Oregon State Univ.*, 591 F.2d 493, 496 (9th Cir.1978) (promise of tenure insufficient to create property interest in continued employment because inconsistent with University's written regulations governing the grant of tenure).

Any promise Sweeney might have made regarding Hyland's tenure is thus unenforceable because California law expressly forecloses any entitlement to retention of a non-civil service post by persons in Hyland's position. That Hyland might have reasonably thought that Sweeney had the authority to cement his volunteer status does not rescue his claim. Hyland is charged with knowledge of California law. *See Bollow*, 650 F.2d at 1100.

In sum, Hyland has no constitutionally cognizable property interest in the perpetuation of his volunteer status. He fails to allege a mutually explicit understanding on termination conditions. Any such promise, moreover, would have been void under California law.

B. Liberty Interest

Hyland also argues that his discharge denied him liberty without due process of law because the charges levelled by the defendants unfairly stigmatized him and severely impeded his ability to obtain future employment. We affirm the district court's holding that Hyland's complaint fails to articulate a constitutionally protected liberty interest.

The Fourteenth Amendment's protection against deprivations of liberty encompasses the right of persons " 'to engage in any of the common occupations of life.' " *Board of Regents*, 408 U.S. at 572, 92 S.Ct. at 2707 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923)); *see also Bollow*, 650 F.2d at 1100 ("The liberty protected by the due process clause of the fifth and fourteenth amendments encompasses an individual's freedom to work and earn a living.") If, in the course of dismissing an employee, the government takes steps or makes charges that so severely stigmatize the employee that she cannot avail herself of other employment opportunities, a claim for deprivation of liberty will stand. *Board of Regents*, 408 U.S. at 573-74, 92 S.Ct. at 2707-08; *Bollow*, 650 F.2d at 1101 ("To implicate constitutional liberty interests . . . the reasons for dismissal must be sufficiently serious to 'stigmatize' or otherwise burden the individual so that he is not able to take advantage of other employment opportunities.").

The stigma imposed must be severe and genuinely debilitating before the discharge can rise to a level of constitutional concern. In other words, the stigma must

"seriously damage[ ] a person's reputation or significantly foreclose[ ] his freedom to take advantage of other employment opportunities." *Bollow*, 650 F.2d at 1101 (quotation omitted).

Hyland cites Sweeney's statement that Hyland could not work as a peace officer in California, other press statements revealing the circumstances of his discharge, and the allegation that Hyland improperly accessed confidential files as the source of his stigma.[4] These statements are insufficiently egregious to activate the protections of the Due Process Clause. These are not the types of charges of immorality, or dishonesty that can cripple an individual's ability to earn a living.

> [T]he constitutional need for procedural protection is not strong when the charge (*e.g.*, incompetence) involves a matter which is peculiarly within the scope of employer-employee relations and when the likely results of even a false charge are reduced economic returns and diminished prestige, but not permanent exclusion from, or protracted interruption of, gainful employment within the trade or profession.

Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361, 366 (9th Cir.1976); *cf. Gray v. Union County Intermediate Educ. Dist.*, 520 F.2d 803, 806 (9th Cir.1975) (suggestion that employee

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[4] Hyland also refers to various threats made by Sweeney and La Plante to prevent Hyland from working in probation ever again. Hyland does not allege, however, that these threats were ever carried out. They thus cannot serve as the predicate for a loss of liberty. *Cf. Bollow*, 650 F.2d at 1101 (reasons for discharge that are never publicly disclosed do not infringe liberty interests).

has difficulty getting along does not deprive individual of liberty because it does not "import serious character defects"). Sweeney and La Plante's charges are unlikely to result in the permanent exclusion or protracted interruption of gainful employment for Hyland. *See Roth*, 856 F.2d at 1411. At most, the charges may make Hyland somewhat less attractive to future employers. This is not enough to implicate the Due Process Clause. *Board of Regents*, 408 U.S. at 574 n. 13, 92 S.Ct. at 2707 n. 13; *see also Roley v. Pierce County Fire Protection Dist. No. 4*, 869 F.2d 491, 495-96 (9th Cir.1989). The federal Constitution is not concerned with every insult hurled in the heat of an employment dispute. Moreover, while not dispositive, the fact that Hyland almost immediately secured a new position is relevant to our assessment of the severity of the defendants' charges against Hyland. *Id.*

Additionally, the protections of the Due Process Clause do not attach to false or damaging accusations alone. The Supreme Court has held that the criticism must be accompanied by the loss or alteration of a right or status recognized by state law before the Due Process Clause is implicated. *Paul v. Davis*, 424 U.S. 693, 708-09, 96 S.Ct. 1155, 1164, 47 L.Ed.2d 405 (1976) (defamation unaccompanied by any tangible loss of a right "vouchsafed . . . by the State" does not deprive an individual of a protected liberty interest); *see also Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 777-78 (9th Cir.1982). Under California law, Hyland has no protected property interest in or legal entitlement to his volunteer position. The loss of his volunteer job thus did not deprive him of a right otherwise protected by state law. "[T]he interest in reputation alone which [Hyland] seeks to vindicate" does not

state a claim for loss of liberty cognizable under the Fourteenth Amendment's Due Process Clause. *Paul*, 424 U.S. at 711, 96 S.Ct. at 1165.

Nor do Sweeney's and La Plante's letters and statements to the Governor concerning Hyland's pardon application support a claim of liberty deprivation under the Due Process Clause, for three reasons. First, Hyland does not allege that Sweeney's and La Plante's contacts actually caused the Governor to deny the pardon.

Second, Sweeney's and La Plante's statements to the Governor were not publicly disclosed, according to the allegations of the complaint. *See Finkelstein v. Bergna*, 924 F.2d 1449, 1452 (9th Cir.), *cert. denied*, 502 U.S. 818, 112 S.Ct. 75, 116 L.Ed.2d 49 (1991).

Third, the grant of a pardon is a discretionary act. Hyland has no right or entitlement to the pardon under state law. As noted earlier, calumny unaccompanied by the loss or alteration of a right or status recognized by state law does not constitute a deprivation of liberty, within the meaning of the Fourteenth Amendment's Due Process Clause. *Id.; see also Paul*, 424 U.S. at 711, 712, 96 S.Ct. at 1165, 1166.

In sum, we affirm the district court's determination that Hyland's complaint failed to state a claim for the deprivation of a constitutionally protected property or liberty interest.

III. Attorney's Fees

Both Hyland and the defendants seek an award of attorney's fees on appeal pursuant to 42 U.S.C. § 1988.

This court is authorized to award attorney's fees to the prevailing party for the prosecution of an appeal in an action brought under 42 U.S.C. § 1983. 42 U.S.C. § 1988; *see Herrington v. County of Sonoma*, 883 F.2d 739, 742-43 (9th Cir.1989). We deny Hyland's request for fees, however, because any determination of Hyland's status as a "prevailing party" would be premature at this stage. *Richardson v. Penfold*, 900 F.2d 116, 118-19 (7th Cir.1990); *see also Mantolete v. Bolger*, 791 F.2d 784, 786 (9th Cir.1986).

The defendants' request for attorney's fees is also denied. Civil rights defendants, unlike plaintiffs, may obtain attorney's fees under 42 U.S.C. § 1988 only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978) (standard for awarding fees to defendants in Title VII action); *see also Hughes v. Rowe*, 449 U.S. 5, 14, 101 S.Ct. 173, 178, 66 L.Ed.2d 163 (1980) (adopting *Christiansburg* standard for purposes of 42 U.S.C. § 1988); *Hensley v. Eckerhart*, 461 U.S. 424, 429 n. 2, 103 S.Ct. 1933, 1937 n. 2, 76 L.Ed.2d 40 (1983); *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 619-20 (9th Cir.1987). Neither Hyland's First Amendment nor his Fourteenth Amendment claim is frivolous or unreasonable.

CONCLUSION

We reverse the district court's dismissal of Hyland's First Amendment claim. By alleging the loss of a valuable governmental benefit as retaliation for constitutionally protected speech on a matter of public concern, Hyland

stated a claim for relief under 42 U.S.C. § 1983. We remand, however, for the factual determination of whether the defendants' need to maintain an efficient and effective workplace justified Hyland's dismissal.

We also affirm the dismissal of Hyland's Fourteenth Amendment claim. Hyland failed to allege a constitutionally cognizable deprivation of property or liberty.[5]

The decision of the district court is AFFIRMED-IN-PART and REVERSED-IN-PART and the case is REMANDED for further proceedings consistent with this opinion. Each party shall bear its own costs.

PREGERSON, Circuit Judge, Concurring:

I concur in the majority opinion with one exception. I do not agree that the charge that Hyland improperly accessed confidential files is insufficiently egregious to activate the protections of the Due Process Clause. The majority states that the charges leveled against Hyland are not within the types of charges of immorality or dishonesty which infringe the liberty interest. *Ante,* at 1141-1143. I disagree.

The Supreme Court and our court have distinguished between charges that challenge an individual's good name, reputation, honor and integrity and charges of incompetence or inability to get along with coworkers. The former infringe the liberty interest while the latter do not. *See Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct.

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[5] This dismissal is without prejudice. If granted leave by the district court, Fed.R.Civ.P. 15(a), Hyland might well be able to amend the complaint to state the loss of an interest sufficient to activate the protections of the Due Process Clause.

2701, 33 L.Ed.2d 548 (1972); *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093 (9th Cir.1981), *cert. denied*, 455 U.S. 948, 102 S.Ct. 1449, 71 L.Ed.2d 662 (1982); *Stretten v. Wadsworth Veterans Hospital*, 537 F.2d 361 (9th Cir.1976); *Gray v. Union County Intermediate Education District*, 520 F.2d 803 (9th Cir.1975); *Jablon v. Trustees of California State Colleges*, 482 F.2d 997 (9th Cir.1973), *cert. denied*, 414 U.S. 1163, 94 S.Ct. 926, 39 L.Ed.2d 116 (1974).

In *Roth*, Wisconsin State University-Oshkosh did not rehire Roth and did not give any reasons for its decision. The Court held that there was "no suggestion whatever that [Roth's] 'good name, reputation, honor, or integrity' [were] at stake." *Roth*, 408 U.S. at 573, 92 S.Ct. at 2707 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971)).

In *Bollow*, Federal Reserve Bank management dismissed Bollow because he "was involved in an altercation with a Bank secretary during which he allegedly shouted profanities and used abusive language" and because of "his inability to get along with other Bank employees, as evidenced by the alleged shouting altercation and other similar incidents involving Bollow." *Bollow*, 650 F.2d at 1096. We held in *Bollow* that "inability to get along charges" do not infringe liberty interests.

In *Stretten*, Wadsworth Veterans Hospital terminated Dr. Stretten because of his "inability to perform satisfactorily as a pathology resident, including an unwillingness or inability to deal with his coworkers in a professional manner." *Stretten*, 537 F.2d at 366. As a result, we found no infringement of liberty and no deprivation of due process.

In *Gray*, the County Intermediate Education District chose not to renew Gray's employment contract. The reasons given included "student and parent problems," "incompetence," "hostility toward authority," and "aggressive behavior." *Gray*, 520 F.2d at 806. We held that "personality differences or difficulty with others" do not "import serious character defects" and "are simply not the kinds of accusations which warrant a hearing. . . ." *Gray*, 520 F.2d at 806.

Finally, in *Jablon*, San Francisco State College decided not to renew Professor Jablon's employment contract for the following year because his academic performance was deemed inadequate. We concluded that the reasons given for nonrenewal "all related to [Jablon's] academic performance at the College, which did not deem him to be a good enough overall teacher and scholar to merit retention." *Jablon*, 482 F.2d at 1000. Significantly, we found that "the College did not attack his honesty or integrity." *Jablon*, 482 F.2d at 1000.

In this case, the accusation that Hyland improperly accessed confidential files impinges on his moral character. The cases the majority relies upon, however, all deal with charges of incompetence or inability to get along with coworkers. Accordingly, I believe that the charges against Hyland are sufficient to implicate the Due Process Clause.

I concur in the result because Hyland's complaint as currently framed is deficient. First, Hyland has not alleged that he suffered the loss of some right or interest protected by state law as required by *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Second,

Hyland has not alleged that the defendants' actions caused the termination of his employment with the National Center on Institutions and Alternatives. Finally, Hyland has not alleged that the defendants' actions caused the Governor to deny his pardon or that their statements to the Governor were publicly disclosed. Of course, if given leave by the district court, Hyland is not precluded from amending his complaint to cure these deficiencies.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 95-15533

(Filed Nov. 5, 1997)

LANRIC HYLAND

Plaintiff - Appellant

v.

ROY L. WONDER, Supervising Judge, Juvenile Court, individually and in his official capacity, et alia; SUPERIOR COURT FOR THE CITY AND COUNTY OF SAN FRANCISCO; DENNIS SWEENEY; FRED JORDAN; STEPHEN LA PLANTE; SAN FRANCISCO JUVENILE PROBATION COMMISSION

Defendants - Appellees

APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED AND REMANDED.

Filed and entered 10/6/97

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LANRIC HYLAND,

Plaintiff-Appellant,

v.

ROY L. WONDER, Supervising Judge, Juvenile Court, Superior Court of the City and County of San Francisco, individually and in his official capacity; DANIEL M. HANLON, Presiding Judge, Superior Court of the City and County of San Francisco, individually and in his official capacity; DENNIS SWEENEY, Chief Probation Officer, San Francisco Juvenile Probation Department, individually and in his official capacity; FRED JORDAN, Chief Probation Officer, San Francisco Juvenile Probation Department, individually and in his official capacity; STEPHEN LA PLANTE, Director, Juvenile Hall, individually and in his official capacity,

Defendants-Appellees.

No. 95-15533

D.C. No. CV 90-00646-MHP

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Argued and Submitted
August 13, 1996 – San Francisco, California

Filed June 25, 1997
Amended October 6, 1997

Before: Joseph T. Sneed, Robert Boochever, and
David R. Thompson, Circuit Judges.

Opinion by Judge Boochever

COUNSEL

Raymond D. Battocchi, Gabeler, Battocchi & Gribbs, McLean, Virginia, for plaintiff-appellant Lanric Hyland.

G. Scott Emblidge, Deputy City Attorney, San Francisco, California, for defendants-appellees City and County of San Francisco, the San Francisco Superior Court, Dennis Sweeney, Fred Jordan and Stephen La Plante.

Sharon S. Chandler, Lewis, D'Amato, Brisbois & Eisgaard, San Francisco, for defendants-appellees Roy L. Wonder and Daniel M. Hanlon.

ORDER

The opinion in the above-entitled case, filed June 25, 1997, is amended as follows:

At Slip op. pg. 7353, at the end of the paragraph numbered [3], change the "." to a "," and add "and the

Navy officer had qualified immunity." Delete the following sentence at the start of the next paragraph, "That analysis applies here."

At Slip op. pg. 7355, on the second line of the runover paragraph, change the words "found a First Amendment violation on" to "applied a first amendment analysis to."

With the opinion thus amended, the panel has unanimously voted to deny the petition for rehearing. Judge Thompson has voted to reject the suggestion for rehearing en banc and Judges Sneed and Boochever so recommend. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

BOOCHEVER, Circuit Judge:

Lanric Hyland, a former volunteer juvenile probation worker, appeals the district court's summary judgment for defendants in his action under 42 U.S.C. § 1983, which alleged that government officials violated his First Amendment rights when they retaliated against him for his criticism of conditions and management at San Francisco's Juvenile Hall.

FACTS

The following facts are drawn from the parties' statement of undisputed facts unless otherwise specified.

Lanric Hyland worked as a special assistant to Dennis Sweeney, the Chief Juvenile Probation Officer ("CJPO") at the Juvenile Probation Department of the City and County of San Francisco ("JPD"), from May 1987 to February 24, 1989. During the relevant time, Judge Daniel Hanlon was the presiding judge of the Superior Court, and Judge Roy Wonder was the supervising judge of the Juvenile Court. Sweeney reported directly to Judge Wonder.

Hyland was a volunteer during most of his time at the JPD. Hyland worked for pay for eight months under grants and thereafter worked without pay for fourteen months. Hyland's identification card identified him as "Special Assistant to the Chief Probation Officer." He had his own desk, phone, and keys to the Youth Guidance Center, the executive area, the probation area, and Juvenile Hall.

In June 1988, Stephen La Plante became the director of Juvenile Hall. In August, the Youth Law Center warned that it would file suit over conditions at Juvenile Hall. In October, the California Youth Authority found Juvenile Hall out of compliance with state standards. In January 1989, the California Youth Authority ("CYA") conducted two inspections of the facility and found it in poor condition, out of compliance with state law standards.

In a declaration filed in opposition to Hyland's summary judgment motion, Sweeney stated that around this time, he asked Hyland to help him draft a performance appraisal of La Plante. Hyland wrote a long draft of the performance evaluation, and rated La Plante's performance unacceptable. Sweeney did not deliver the unfavorable evaluation of La Plante to him, or take any other action.

In February 1989, the CYA notified Sweeney and Judge Wonder that Juvenile Hall did not meet minimum standards, and threatened to withdraw its certification. Hyland then decided to take matters into his own hands. Hyland wrote a long memorandum addressed to Judge Hanlon, Judge Wonder, and Judge Daniel Weinstein, the former supervising judge of the Juvenile Court. The memo detailed the problems at Juvenile Hall, documented La Plante's alleged mistakes, failures, and general incompetence to administer Juvenile Hall, and recommended that La Plante be fired.

Hyland showed the draft memorandum to Sweeney on February 24, 1989. After skimming the memorandum, Sweeney told Hyland that his relationship with the Juvenile Court was finished. Sweeney demanded Hyland's keys, and told Hyland he would issue a memorandum stating Hyland was not to be allowed back into Juvenile Hall. [ER p. 74]

Hyland decided to send the memorandum, and on February 27 he delivered the memorandum to Judges Wonder, Hanlon, and Weinstein. An addendum to the memorandum explained Hyland's reasons for disseminating it despite Sweeney's disapproval. In June 1989,

the CYA withdrew its certification of Juvenile Hall because of inadequate staff training and overcrowding.

Hyland's second amended complaint further alleges the following: on March 6, 1989, Judges Wonder and Hanlon, in concert with Sweeney and La Plante, decided to fire Hyland, in retaliation for his memorandum.

The retaliation continued. On March 12, 1989, Sweeney told a newspaper reporter "Just ask Hyland why he can't be a peace officer in the state of California," an apparent reference to Hyland's 1964 felony conviction. On March 14, La Plante told a supervising counselor that "Sweeney and I will make damn sure Hyland never gets another job in corrections or juvenile justice, if we can help it." On March 20, Sweeney told a probation officer that he planned to take out a full-page ad in a national correctional association publication to tarnish Hyland's reputation. There is no evidence, however, that such an ad was published.

Hyland had been convicted of armed robbery in 1964, and after his release from prison in 1967 and his discharge from parole in 1970, he earned a graduate degree in criminal justice and obtained considerable experience in the administration of criminal justice. Before he could realize his ambition of becoming a deputy chief probation officer, however, he needed to receive a pardon from the Governor of California. Sweeney had promised that he would help Hyland to obtain a pardon.

Sweeney and La Plante, each of whom had written supporting Hyland's application for a pardon, now actively worked to make sure the application was denied. Sweeney wrote withdrawing his support, and called the

governor's office to recommend a denial of the pardon, falsely alleging that Hyland had released confidential juvenile court information in another matter. La Plante also withdrew his letter of support. Sweeney and La Plante also convinced another judge who had written in support of Hyland's pardon application to withdraw his support. Hyland appealed to Judges Wonder and Hanlon to prevent Sweeney and La Plante from continuing to retaliate against him, but the judges failed to act. In May 1989, the governor denied Hyland's pardon application, although the Board of Prison Terms and the California Supreme Court had unanimously recommended its approval. The governor's internal review procedure had reached the same conclusion recommending approval.

Hyland also alleged interference with his employer. Shortly after his termination in March 1989, Hyland obtained a position as a paid consultant to the National Center on Institutions and Alternatives ("NCIA"), a non-profit organization that recommends sentencing options to defense counsel. Hyland's job was to interview juvenile detainees and write reports for presentation to sentencing judges. In June 1989, Hyland wrote to Judges Hanlon and Wonder asking them to prevent Sweeney and La Plante from continuing their retaliation. Hyland appeared at Juvenile Hall for a meeting with a juvenile detainee, and La Plante barred his entry.

In July, Judge Wonder called the Executive Director of the NCIA's Western Regional Office, Vincent Schiraldi, into a meeting. Schiraldi wrote in a subsequent letter to Hyland (attached as an exhibit to the complaint) that as a

result of the meeting, the NCIA "must regrettably terminate" Hyland's employment on cases before San Francisco Juvenile Court because "Judge Wonder informed us that you were not to be allowed into the Juvenile Hall and that your presence on cases could be detrimental to our clients." [ER p. 44] On July 11, the Superior Court executive committee met and ratified the decision to exclude Hyland from Juvenile Hall.

In July 1989, Hyland interviewed for the position of director of the Juvenile Justice Commission. He alleges he was not selected for further interviews because of his memorandum about La Plante. Hyland also alleges that the defendants made a variety of public statements to retaliate against him, including Sweeney's false statement on local television news that Hyland had released to the public confidential juvenile court records, and Judge Wonder's statement in a newspaper article to the effect that Hyland was a disservice to his clients.

In January 1990, San Francisco voters passed Proposition L, which created the Juvenile Probation Commission ("JPC") and gave it authority over Juvenile Hall, removing supervisory authority from the Superior Court. Sweeney resigned and was replaced by Fred Jordan as Chief Juvenile Probation Officer. In February 1990, Hyland and the NCIA wrote Jordan asking that Hyland be admitted to Juvenile Hall, and Jordan refused to lift the ban. In June 1990, Hyland wrote to the JPC asking for a review of Jordan's decision. The JPC voted on and ratified the decision to continue the ban in July 1990.

Hyland also applied for employment as Executive Secretary of the JPC and Director of Community Services

Programs of the JPD. He was not considered for the positions.

PROCEDURAL HISTORY

Hyland filed a complaint under 42 U.S.C. § 1983 in March 1990, and amended it in May 1990, alleging (in addition to state law claims) that the defendants violated his due process rights and his First Amendment rights by retaliating against him for the memorandum critical of La Plante's management of Juvenile Hall. In October 1990, the district court dismissed the federal claims for failure to state a claim, on the ground that Hyland's speech was not protected by the First Amendment and that he alleged no protected due process interest. The district court dismissed the state claims for lack of jurisdiction. This court reversed in part, affirming the dismissal of the due process claim but holding that Hyland's First Amendment claim was sufficient, and remanded "for the factual determination of whether the defendants' need to maintain an efficient and effective workplace justified Hyland's dismissal." *Hyland v. Wonder,* 972 F.2d 1129, 1143 (9th Cir. 1992), *cert. denied,* 508 U.S. 908 (1993) (*Hyland I*).

Hyland filed a second amended complaint and moved for summary judgment on the First Amendment claim. The defendants asserted qualified immunity. The district court granted the individual defendants summary judgment on the ground of qualified immunity, finding that it was not "clearly established" in 1989 that a government volunteer possessed the same First Amendment rights as government employee. The court also granted

summary judgment to other defendants on claims not in issue here, and ordered further briefing on Eleventh Amendment and municipal liability issues.

Hyland moved for reconsideration, and on July 1, 1994, the district court denied the motion. Hyland argued that after his termination, any retaliation against him was directed at a private citizen, not a volunteer or employee, and that it was clearly established that a private citizen has a First Amendment right to be free from retaliation. The district court held that the post-termination retaliation was not actionable under § 1983, because the retaliation "fails to implicate sufficiently a protected property or liberty interest." [ER p. 187]

The district court granted summary judgment against Hyland on the remainder of his federal claims on February 9, 1995, and dismissed the state claims without prejudice. First, the district court ruled that Judges Wonder and Hanlon had Eleventh Amendment immunity as employees of the state rather than local government. Second, the district court ruled that the damages claims against Sweeney and La Plante in their official capacities were based on municipal liability, but that the facts showed as a matter of law that none of the defendants had final policy-making authority over Hyland's termination, and no one with such authority had ratified their decision to fire him. The court therefore did not rule on the factual issue this court remanded to it – "whether the defendants' need to maintain an efficient and effective workplace justified Hyland's dismissal." *Hyland I*, 972 F.2d 1129.

Hyland appeals.

I. *Qualified Immunity*

We review a determination of qualified immunity *de novo*. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993).

> When a public official asserts qualified immunity for constitutional violations, the district court must apply a two-part analysis. The court must first determine whether the plaintiff has alleged a violation of a right that is clearly established and stated with particularity. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. The plaintiff bears the burden of showing that the right he alleges to have been violated was clearly established. Second, the court must consider whether, under the facts alleged, a reasonable official could have believed that his conduct was lawful. It is the defendant's burden to show that a reasonable officer could have believed, in light of the settled law, that he was not violating a constitutional . . . right.

Collins v. Jordan, 110 F.3d 1363, ___ (9th Cir. 1997) (as amended) (quotations and citations omitted).

A. *Hyland's termination*

Hyland alleged that Sweeney's actions in dismissing him violated his First Amendment right to express himself regarding the conditions at Juvenile Hall. We have held that as early as 1983 "[i]t could hardly be disputed that . . . an individual had a clearly established right to be free of intentional retaliation by government officials based upon that individual's constitutionally protected

expression." *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1319 (9th Cir. 1989). When the individual is a government employee, he or she has a right to speak on issues of public importance without being fired from public employment. *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968). In *Hyland I*, we noted that the well-established "right of public employees to speak on matters of public concern . . . is an outgrowth of the constitutional tenet that public officials may not deny or deprive a person of a governmental benefit or privilege on a basis that infringes her or his freedom of speech." 972 F.2d at 1134.

Appellees do not argue that it was not clearly established that Hyland had a right to speak. Nor do they disagree with our conclusion in *Hyland I* that Hyland's memorandum discussed a matter of public concern. *Id.* at 1137. Instead, they dispute that the termination deprived Hyland of a governmental benefit or privilege, "belabor[ing] the issue of Hyland's status as either a public employee or a volunteer." *Id.* at 1134. Unless Hyland's right to a volunteer position was clearly established in 1989, they claim, the defendants are protected by qualified immunity because a reasonable official would not have known that retaliating by firing him was unlawful.

In *Hyland I*, we held that Hyland's complaint stated a claim of a First Amendment violation:

> [W]hether Hyland is labelled a public employee or a volunteer is not determinative of whether Hyland stated a claim of First Amendment infringement. Nor is the at-will nature of his position dispositive. The critical question is simply whether Hyland has alleged the loss of a valuable governmental benefit or privilege in

> retaliation for his speech. We conclude that the loss of a high-level volunteer position, such as that held by Hyland in the JPD, constitutes a deprivation of a valuable governmental benefit or privilege.

Id. at 1136. Appellees argue that until *Hyland I* was decided, it was not clearly established that the loss of a position such as Hyland's was a deprivation that would violate the First Amendment.

We disagree. Even disregarding that Hyland was paid for more than a third of his time as Sweeney's special assistant, it would have been evident to a reasonable official that Hyland's work was a valuable benefit, and that firing him because he expressed himself as he did violated the First Amendment.

It was clearly established before Hyland was terminated in 1989 that the government may not deny a person a valuable benefit "on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). When the valuable benefit is public employment, the government may not take it away when an employee speaks out on a matter of public importance. *Pickering*, 391 U.S. at 574; *Connick v. Myers*, 461 U.S. 138 (1983). Courts must seek " 'a balance between the interests of the [employee], as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Connick*, 461 U.S. at 136 (quoting *Pickering*, 391 U.S. at 568).

Government benefits other than employment cannot be withdrawn merely because the government does not like the individual's speech; this proposition was clearly established in 1989. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969) (welfare benefits); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (unemployment benefits); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (tax exemptions). "We have specifically recognized that the rule of *Perry v. Sindermann* and *Connick v. Myers* applies beyond the employment context." *Hyland I*, 972 F.2d at 1135, (citing *Havekost v. United States Dep't of the Navy*, 925 F.2d 316 (9th Cir. 1991)).

In *Havekost*, we considered whether qualified immunity protected the Navy when, in 1988, an officer revoked a grocery bagger's license to work for tips on a military base when the bagger criticized the head bagger. Although the license "was not an employment contract, but rather a revocable grant of permission to work for customer tips," and Havekost was not under the supervision or control of any government official, 925 F.2d at 317, we held that it was clearly established in 1988 that the government could not revoke the license if Havekost exercised her First Amendment right to speak on issues of public concern. Although Havekost was not an employee, we applied the *Pickering* "public concern" requirement. We held, however, that because the speech in question was not a matter of public concern but rather "nothing more than a workplace grievance," *id.* at 318, the First Amendment did not protect it, and the Navy officer had qualified immunity.

Unlike *Havekost*, Hyland's speech clearly involved matters of public concern. Because, as *Havekost* states, it

was clearly established in 1988 that a government benefit short of employment could not be revoked when an individual speaks out on a matter of public concern, then the government officials in this case cannot claim qualified immunity for their actions in 1989. A reasonable official should have known that it violated the First Amendment to dismiss Hyland and bar him from Juvenile Hall because of his protected expression.

> The fact of interference [with First Amendment rights] is not altered by the circumstance that the victims are not classified as employees. . . . Government officials may indeed terminate at-will relationships, unmodified by any legal constraints, without cause; but it does not follow that this discretion can be exercised to impose conditions on expressing, or not expressing, specific . . . views.

O'Hare Truck Serv., Inc. v. City of Northlake, 116 S. Ct. 2353, 2359, 2361 (1996).

Appellees argue that it was not clearly established when Sweeney fired Hyland in 1989 that the particular benefit in this case, a highly-placed volunteer position, was protected from government action. We stated in *Hyland I* that "the opportunity to serve as a volunteer constitutes the type of governmental benefit or privilege the deprivation of which can trigger First Amendment scrutiny." 972 F.2d at 1135. Hyland's appeal, of course, had not yet been decided when Hyland was fired, so *Hyland I* alone cannot establish the right in question. Appellees insist that because there was no previous Ninth Circuit case involving a volunteer, no reasonable official

would have known that the action of firing Hyland violated the First Amendment.

The Supreme Court and our case law do not require that degree of specificity.

> [T]he right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987). It was clearly established in 1988 that the government could not take action against an individual who, while not a salaried employee, received a valuable benefit analogous to employment, because that individual exercised his First Amendment right to speak out on a matter of public concern. *Havekost*, 925 F.2d at 317-18. In *Havekost*, we found such a valuable benefit existed without requiring that the plaintiff produce cases involving identical facts; we do the same here. When Hyland was fired in 1989, the "contours of the right [were] sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right," *Anderson*, 483 U.S. at 640: the right to speak on matters of public concern without the loss of a valuable government benefit.

Moreover, ten years before Hyland was fired, the Second Circuit had found a First Amendment violation

on very similar facts. *Janusaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17 (2d Cir. 1979) held that the First Amendment applied when an individual lost a volunteer firefighter position for complaining about the morale and training of the department. The Second Circuit applied *Pickering*, balancing the "interest of the 'whistle blowers' who, in good conscience, seek to expose inefficiency and corruption in government with the interest of the governmental employer whose daily functioning in some cases demands performance without personal friction." *Id.* at 25. In *Janusaitis*, the court concluded that the First Amendment was not violated, because the volunteer firefighter's expression was incompatible with the department's need for close working relationships, smooth functioning, and healthy morale. *Id.* at 27; *see Hyland I*, 972 F.2d at 1135 n.1. *Pickering*'s analysis had thus been applied to a volunteer position before *Havekost* or *Hyland I* were decided.

We do not hold that it was clearly established that Hyland's volunteer position was the equivalent of employment. We hold only that Hyland showed it was clearly established that when he was fired, the *Pickering* analysis, created in the employment context, also applied to individuals who were not technically employees when they alleged (1) the loss of a valuable government benefit (2) in retaliation for their speech (3) on a matter of public concern. The defendants did not show that a reasonable official could have believed that firing Hyland because of his memorandum did not violate his constitutional rights. The district court therefore erred in granting qualified immunity for Hyland's termination to the defendants.

B. *Post-dismissal retaliation*

The district court held that the individual defendants were protected by qualified immunity from Hyland's claims of continuing retaliation after he was fired, because the post-termination retaliation did not implicate any liberty or property right.

In *Hyland I*, we affirmed the district court's decision that Hyland failed to state a due process claim because he lacked a property or liberty interest in his position as a volunteer. While Hyland did not have a due process right to continue in his volunteer position, he did have a First Amendment right not to be retaliated against for his protected speech. *Perry*, 408 U.S. at 597-98 (lack of property interest in government benefit "is immaterial to [a] free-speech claim[ ]."") As we held above, dismissal from a volunteer position can constitute unconstitutional retaliation. There is ample authority that retaliatory acts other than actual discharge can serve as the basis for a First Amendment claim. *See, e.g., Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1039 (9th Cir. 1990) (ostracism, silent treatment, selective enforcement of the rules, and poor reviews can all be acts of retaliation); *Allen v. Scribner*, 812 F.2d 426, 429 (9th Cir. 1987) (retaliation included transfer, defamatory statements to the media, intimidation, and harassment), *amended*, 828 F.2d 1445 (9th Cir. 1987).

The district court erred in granting qualified immunity to the defendants for the acts of post-termination retaliation.

II. *Eleventh Amendment Immunity*

The district court found that because the Superior Court was an arm of the state of California, Hyland's claims for damages against Superior Court Judges Wonder and Hanlon were claims against state officials barred by Eleventh Amendment sovereign immunity. We review de novo whether there is immunity from suit under the Eleventh Amendment. *Micomonaco v. Washington*, 45 F.3d 316, 319 (9th Cir. 1995). The party asserting Eleventh Amendment immunity has the burden of proving its applicability. *ITSI TV Prods., Inc. v. Agricultural Ass'ns*, 3 F.3d 1289, 1291 (9th Cir. 1993).

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend XI. The amendment also bars a citizen from bringing a suit against his own state in federal court. *Micomonaco*, 45 F.3d at 319. "[T]he reference to actions 'against one of the United States' encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities." *Regents of the Univ. of Calif. v. Doe*, 117 S. Ct. 900, 903 (1997).

"[S]tate case law and constitutional provisions make clear that the [California Superior] Court is a state agency." *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1110 (9th Cir. 1987). In this suit, however, the Superior Court itself is not a defendant,

only Judges Hanlon and Wonder. As judges paid by the state, they are state agents or employees, *see id.*, but they are not automatically entitled to sovereign immunity.

"Where the State itself or one of its agencies or departments is not named as defendant and where a state official is named instead, the Eleventh Amendment status of the suit is less straightforward." *Papasan v. Allain*, 478 U.S. 265, 276 (1986). "We must look behind the pleadings to determine whether a decree in the case would operate in fact against the sovereign. If the judgment would actually run against the state treasury, the action is barred." *Zolin*, 812 F.2d at 1110 (quotations and citations omitted). If the state officials can show that "the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Regents of Univ. of Calif.*, 117 S. Ct. at 903-04 (quotations omitted). If the state is not legally liable for any judgment against the named individuals, and local government, rather than the state, would be responsible for any money judgment rendered, an action against individual defendants who are state employees is not barred by the Eleventh Amendment. *Zolin*, 812 F.2d at 1110-11.

The judge defendants argue that their administrative function in overseeing the county's juvenile probation system did not transform them into local rather than state officials. That, however, is not the point. The question in

this case is not whether the judges were acting administratively[1] or even whether they somehow "became" local officials. Instead, the issue is " 'who is legally obligated to pay the judgment that is being sought.' " *Regents of Univ. of Calif.*, 117 S. Ct. at 903 (quoting *Doe v. Lawrence Livermore Nat'l Lab.*, 65 F.3d 771, 777-78 (9th Cir. 1995) (Canby, J., dissenting)).

Hyland argues that the real party in interest is the city, which would pay any money judgment entered against Judges Wonder and Hanlon. Defendants admitted in the district court that the state would not have a legal duty to pay any judgment against the Superior Court or its judges, although they also claimed that Eleventh Amendment immunity would prevent the entry of any judgment. [ER pp. 148-49] On appeal, the defendants do not point to any evidence that the state would be liable for the judgment. The judges have not met their burden to show that they are protected by Eleventh Amendment immunity. We therefore hold that the district court erred in finding that the judges were immune from suit.

III. *Municipal Liability*

The district court ordered briefing on this issue, and the defendants filed a motion for summary judgment arguing that there was no municipal liability. The district court granted the motion, holding that the City and

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[1] A judge may lose the protection of *judicial* immunity when performing an administrative act. *Crooks v. Maynard*, 913 F.2d 699, 700 (9th Cir. 1990). Judges Hanlon and Wonder do not argue that they are entitled to judicial immunity.

County of San Francisco were not liable for damages for Hyland's termination because none of the named defendants had final policymaking authority, and Hyland's firing was never ratified by any policymaker. The district court also held that Hyland's claims of damages for post-termination retaliation failed as a matter of law, because on some of the claims the JPC did not have final policymaking authority. As for Hyland's ban from Juvenile Hall, over which the JPC did have policymaking authority, the district court held that the JPC never formally ratified the ban.

The complaint names city officials Sweeney, Jordan and La Plante in their official capacities, which " 'represent[s] only another way of pleading an action against an entity of which an officer is an agent.' . . . [T]he real party in interest is the entity." *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (quoting *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 690 n.55 (1978)). "A local government entity cannot be held liable under § 1983 unless the plaintiff alleges that the action inflicting injury flowed from either an explicitly adopted or a tacitly authorized [governmental] policy." *Ortez v. Washington Cty.*, 88 F.3d 804, 811 (9th Cir. 1996) (quotation and citation omitted).

> [A] plaintiff may show that, rather than being the product of general official policy, on a given occasion the conduct was the result of "a deliberate choice . . . made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84 (1986). Finally, a plaintiff may show that an official policymaker either delegated policymaking authority to a

> subordinate or ratified a subordinate's decision, approving the "decision and the basis for it." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 126-27 (1988).

Fuller v. City of Oakland, 47 F.3d 1522, 1535 (9th Cir. 1995) (as amended).

A. *Termination and ban from Juvenile Hall*

The district judge found as a matter of law that final policymaking authority over personnel matters in the JPD rested with the Board of Supervisors or the Civil Service Commission, and that Sweeney, as the Chief Juvenile Probation Officer ("CJPO"), therefore had no final authority to terminate Hyland. The judge also concluded that it was undisputed that neither the Board of Supervisors nor the Civil Service Commission ever ratified the decision to fire Hyland. Hyland argues that the Superior Court had been delegated final policymaking responsibility over matters in the JPD, and that the judges delegated their authority to fire Hyland to Sweeney, his immediate supervisor.

"[T]he identification of policymaking officials is a question of state law," *Praprotnik*, 585 U.S. at 124, and under California law, a city's Charter determines municipal affairs such as personnel matters. *City and County of San Francisco v. Patterson*, 202 Cal. App. 3d 95, 102 (Cal. Ct. App. 1988).

The Charter of the City of San Francisco provides that

> [t]he chief probation officer of the juvenile court shall appoint such assistants, deputies and

> employees as may be allowed or provided by the board of supervisors, subject to confirmation by the juvenile probation board or committee created by state law. . . . The civil service provisions of this charter shall apply to and govern the assistants, deputies and employees of the . . . chief probation officer of the juvenile court. . . . [T]he said chief probation officer of the juvenile court shall be the appointing officer as to his assistants, deputies and employees, subject to confirmation as aforesaid.

San Francisco, Calif., Charter § 4.105. All boards appointed by the mayor (including the juvenile probation board) "have powers and duties . . . [t]o prescribe reasonable rules and regulations . . . for the conduct and government of its officers and employees," Charter § 3.500(a), and to hold executive sessions to "consider the appointment, employment or dismissal of a public officer or employee." *Id.* § 3.500(f)(1).

Hyland argues that the Charter thus delegates authority over employees to the juvenile probation board, which, in this case, was the Superior Court judges. Citing deposition testimony by Judge Wonder that the judges "left the internal management of the Juvenile Probation Department to [Sweeney] and attempted not to interfere. . . . We did not formulate any policy concerning employees," [ER pp. 170, 173] Hyland contends that the judges in turn delegated the Juvenile Probation Board's authority to Sweeney, the CJPO, and his successor, Jordan.

The defendants respond that, under the Charter, the Board of Supervisors or the Civil Service Commission retained power over personnel decisions, in which case

none of the named defendants was a final policymaker. The district court agreed with the defendants, concluding that any personnel decisions by Sweeney or Jordan as CJPO were subject to ratification by the Board of Supervisors or the Civil Service Commission, and that in this case no ratification occurred. The court failed to discuss whether the Board of Supervisors or the Civil Service Commission delegated authority over personnel matters to the Superior Court in its capacity as the juvenile probation board.

Absent from the defendants' and the district court's discussion of who had final policymaking authority over Hyland's status is any acknowledgment that Hyland was not, strictly speaking, an employee, but a volunteer. On the one hand, the defendants argue that Hyland cannot be treated as an employee as regards his First Amendment rights; on the other hand, they argue that he must be treated as an employee, and his firing must be treated as a personnel decision, for the purpose of establishing as a matter of law that the city is not liable under *Monell*. Hyland cannot be an employee for one purpose and not for the other. As a volunteer, he does not automatically fall under the provisions of the city Charter regarding employees. The Charter does not specify who has policymaking authority over hiring and firing volunteers.

Further, Sweeney's own testimony was that Hyland, rather than being an employee, was a volunteer "professional and personal confidante," with "no official connection to any other member of the Department." [SER pp. 3-4] Sweeney's declaration stated that the civil service system did not recognize Hyland's volunteer position, which was "not authorized under any rule, ordinance,

regulation or law [and] was based entirely on an unwritten and personal understanding." [SER p. 4] He further stated that he "severed Hyland's volunteer status as my assistant" because the memo destroyed his "confidential relationship" with Hyland, which was "the sole reason he was allowed access to the Department and Juvenile Hall." [SER p. 7]

The uncontroverted evidence thus establishes that Hyland was not an employee, and neither the Civil Service Commission nor the Board of Supervisors were the final policymakers regarding his position; that the Superior Court judges in charge of the JPD delegated all internal management issues to Sweeney; and that Sweeney exercised his delegated powers in appointing Hyland and, eventually, in terminating Hyland as his volunteer personal assistant. The district court therefore erred in granting summary judgment to the defendants on the *Monell* issue.

We remand to the district court to enter summary judgment for Hyland on this issue. The facts necessary to determine *Monell* liability are not in dispute, and the evidence in the record establishes that Sweeney, in terminating Hyland's tenure as a volunteer, acted as a final policymaker with regard to Hyland's position as his volunteer personal assistant. Hyland is entitled to summary judgment on municipal liability. *See Lawyers Title Insurance Corp. v. Honolulu Fed. Sav. & Loan Ass'n*, 900 F.2d 159, 165 (9th Cir. 1990) (as amended) (when record supports only one resolution of a factual issue, court of appeals can order district court to enter judgment on that issue).

B. *Ban from Juvenile Hall*

Hyland argues that it was unconstitutional retaliation for Judge Wonder to ban him from Juvenile Hall after he was fired, which ban prevented him from performing his work for the National Center on Institutions and Alternatives interviewing juvenile detainees. After Proposition L transferred the authority over Juvenile Hall from the Superior Court judges to the Juvenile Parole Commission ("JPC") in January 1990, Hyland alleges that then CJPO Jordan refused to consider his job applications and continued to ban him from Juvenile Hall. Schiraldi, who was then a member of the JPC's executive committee, testified in an uncontested affidavit that the executive committee met in July 1990 to discuss whether to continue the ban, and approved Jordan's refusal to allow Hyland to enter.

Schiraldi's affidavit clearly states that Judge Wonder approved the initial ban of Hyland from Juvenile Hall. It also establishes that the JPC ratified the continued ban of Hyland, and the defendants concede that the JPC had final policymaking authority over the ban after the JPC was established in January 1990. Nevertheless, the district court found that no ratification occurred because the ratification was not reported in the official minutes of the executive committee meeting. Such a failure to report an action does not defeat an allegation of municipal liability, which is available "for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Monell*, 436 U.S. at 690-91. The executive committee's ratification does not require formal approval for the purpose of establishing a violation of federal law under § 1983. To find otherwise

would allow municipalities to ratify with impunity the unconstitutional actions of their officers, as long as they concealed that ratification by failing to report their actions through official channels.

We hold that as a matter of law the uncontradicted evidence in the record establishes that the officials with authority over access to Juvenile Hall, Judge Wonder of the Superior Court and later the JPC, both ratified the ban of Hyland from Juvenile Hall, and so municipal liability exists. Hyland was entitled to summary judgment on this issue, and we remand to the district court for entry of such a judgment. *See Lawyers Title*, 900 F.2d at 164.

C. *Job applications*

Hyland also alleges that his job applications to the JPC, when Jordan was CJPO, were rejected in retaliation for his memorandum. After Proposition L, the city Charter gave the JPC the power to create positions which were not subject to civil service provisions. *See* Charter § 3.699-2. [SER p. 50] Both the positions that Hyland applied for were civil service exempt.

Schiraldi's affidavit states that the JPC's executive committee approved Jordan's "actions." The defendants introduced no opposing affidavit or other evidence to establish that the executive committee did not approve Jordan's actions, or that it approved some but not all of his actions. On appeal, they argue only that the CSC had the final policymaking authority over personnel decisions. That is irrelevant, as the positions for which Hyland applied were civil service exempt.

We remand for entry of summary judgment for Hyland on this ground for *Monell* liability.

IV. *Attorney Fees*

Hyland requests attorney fees under 42 U.S.C. § 1988. As we held in *Hyland I*, it is premature to award attorney fees, because Hyland cannot be designated a prevailing party until all issues have been resolved and he has obtained some relief on the merits of his claims that benefits him directly. *Farrar v. Hobby*, 113 S. Ct. 566, 573-74 (1992); *Martinez v. Wilson*, 32 F.3d 1415, 1422 (9th Cir. 1994).

CONCLUSION

We hold that the district court erred in granting qualified immunity to the individual defendants. We also hold that the district court erred in determining that the action against Judges Wonder and Hanlon was barred by Eleventh Amendment immunity, because those defendants introduced no evidence that the state would be legally liable for any damages assessed against the judges. We hold that Hyland is entitled to summary judgment on the issue of *Monell* liability, because uncontradicted facts show that Sweeney had the policymaking authority to fire a volunteer in a position such as Hyland's, and that the JPC ratified the decision to ban Hyland from Juvenile Hall and the refusal to consider Hyland for future jobs.

We remand for entry of partial summary judgment in favor of Hyland in accordance with this opinion. We

further remand for determination of the factual issue remanded in *Hyland I*, "whether the defendants' need to maintain an efficient and effective workplace justified Hyland's dismissal." *Hyland I*, 972 F.2d at 1143. We again direct the district court's attention to *Hyland I*'s detailed description of the necessary inquiry. *Id.* at 1139-40. We emphasize that because Hyland's speech involved a matter of public concern, the defendants bear the burden to justify the actions taken against Hyland. *Id.* at 1139. The defendants' burden to justify the termination and subsequent retaliation is particularly heavy, because the public's interest in the administration of the juvenile justice system is great. *See Connick*, 461 U.S. at 150; *Voigt v. Savell*, 70 F.3d 1552, 1560 (9th Cir. 1995) (burden to justify discharge depends on nature of employee speech), *cert. denied*, 116 S. Ct. 1826 (1996). Hyland's memorandum addressed only matters of great public concern and was circulated only to his superiors and to relevant authorities. As we stated subsequent to the opinion in *Hyland I*,

> [t]he First Amendment balancing test [of *Pickering*] can hardly be controlled by a finding that [workplace] disruption did occur. An employee who accurately exposes rampant corruption in her office no doubt may disrupt and demoralize much of the office. But it would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office. In other words, the County does not have a legitimate interest in covering up mismanagement or corruption and cannot justify retaliation against whistleblowers as a legitimate means of avoiding the disruption that necessarily accompanies such exposure.

Johnson v. Multnomah Cty., 48 F.3d 420, 427 (9th Cir. 1995) (quotations and citations omitted).

REVERSED AND REMANDED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LANRIC HYLAND,
Plaintiff,
vs.
ROY L. WONDER, Supervising Judge, Juvenile Court, et al.
Defendants.

No. C-90 0646 MHP

MEMORANDUM AND ORDER

(Filed Sep. 2, 1993)

Plaintiff Lanric Hyland ("Hyland") brings this action against defendants, judges and juvenile justice officials employed by the City and County of San Francisco ("defendants"), in their personal and official capacities, seeking damages and injunctive relief under 42 U.S.C. sections 1983 and 1985, and pendent California state law. Hyland alleges that in February and March 1989 defendants conspired to and did deny him his position as a volunteer at the San Francisco juvenile detention facility in retaliation for a memorandum he authored critical of facility practices, in violation of his first amendment and state law rights. This matter is before the court on cross-motions for summary judgment, after remand from the Ninth Circuit's opinion in *Hyland v. Wonder*, 972 F.2d 1129 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2337 (1993).[1]

The Ninth Circuit ordered this court on remand to determine whether Hyland's memorandum was so disruptive as to outweigh his first amendment protections,

and Hyland has moved for summary judgment on this issue alone.

Defendants have moved for summary judgment on each of Hyland's claims. First, as to Hyland's section 1983 claims, defendants assert qualified immunity. Second, as to Hyland's state statutory claim defendants assert that the claim is barred because Hyland is not entitled to protection under that statute as a matter of law; or, alternatively, for failure to exhaust administrative remedies; or, alternatively, for failure to present the claim to this court in a timely manner. Third, as to Hyland's conspiracy claims, defendants assert that they cannot be sustained as a matter of law because the underlying federal and state law claims themselves fail. Fourth, as to Hyland's request for declaratory and injunctive relief, defendants assert that the requested relief is either impossible or moot. Finally, defendants assert that defendant Walsh is not properly before the court, pursuant to an earlier dismissal by Hyland of that defendant.

Having considered the arguments and submissions of the parties, and for the reasons stated below, the court enters the following memorandum and order.

BACKGROUND

Plaintiff Lanric Hyland served at the Superior Court of the City and County of San Francisco Juvenile Probation Department ("JPD") as a Special Assistant to Chief Probation Officer Dennis Sweeny between 1987 and 1989.[2]

From June 1988 to June 1989, defendant Daniel Hanlon was Presiding Judge of the Superior Court for the City and County of San Francisco, which at that time had administrative responsibility for the JPD. Defendant Roy Wonder was the Supervising Judge of the Juvenile Court from July 1988 to January 1989.

Defendant Dennis Sweeny served as Chief Probation Officer of the JPD from 1985 to January 1990, a position to which he was appointed by Superior Court judges; he reported directly to the Supervising Judge, at that time Judge Wonder. Defendant Fred Jordan replaced Sweeny in that position in January 1990. Defendant Stephen LaPlante served as the Director of Juvenile Hall of the City and County of San Francisco from June 1988 until 1990, and reported to defendant Sweeny.

Defendant John Walsh served until May 1992 as the General Manager of Personnel for the Civil Service Commission for the City and County of San Francisco.

Hyland began working for Sweeny, apparently without pay, in May 1987. Pl.'s 2nd Am. Comp. ¶ 17. He alleges that he undertook this work in exchange for Sweeny's promise to make a best faith effort to obtain compensation for him and to assist him in obtaining a pardon for a 1964 felony conviction. *Id.* Over the next several years, Hyland worked continuously for Sweeny, sometimes with pay, sometimes without.

From September 1, 1987 until January 31, 1988, Hyland received compensation for his work under a grant from the San Francisco Foundation, and, at Sweeny's behest, performed a variety of writing projects relating to Sweeny's official duties. From February 1,

1988 until March 1, 1988, Hyland again served Sweeny without compensation. On March 1, 1988, Sweeny appointed Hyland to a position as a 9704 Employment and Training Specialist II in a non-civil service status. Hyland was laid off from that position in June 1988, and worked for Sweeny, without compensation, until February 24, 1989.

In 1988, three Superior Court judges wrote the Governor's office recommending that Hyland receive a pardon; in March 1988, Sweeny did so as well, noting that Hyland had provided him "invaluable executive assistance." In August 1988, LaPlante also wrote the Governor's office recommending a pardon for Hyland.

Between September 1987 and February 24, 1989, Hyland was issued a department identification card designating him as "Special Assistant to the Chief Probation Officer". He had a desk, a phone, and a set of keys which included keys to the Youth Guidance Center, the Executive Office area, the probation area, and Juvenile Hall.

Problems at Juvenile Hall led to a series of investigations by various federal, state and private agencies, beginning in 1987. During the course of these investigations, Hyland drafted an eight page memorandum addressed to Judges Wonder and Hanlon, and a third judge, Judge Daniel Weinstein, complaining about the manner in which Juvenile Hall was being run. Before work on February 24, 1989, Hyland presented Sweeny a draft of the memorandum at Sweeny's home. Upon seeing to whom the memorandum was addressed and after skimming its contents, Sweeny informed Hyland that

Hyland's relationship with the Juvenile Court was finished. Sweeny requested return of Hyland's keys and informed Hyland that a memorandum would be issued denying Hyland further access to Juvenile Hall. On February 27, 1989, Hyland delivered copies of his memorandum to Judges Hanlon and Wonder.

Hyland alleges that Sweeny lacked the authority to terminate him from his position, and that on March 6, 1989, Judges Wonder and Hanlon, acting in concert with Sweeny and LaPlante, made the final decision to terminate Hyland in retaliation for the views he expressed in his memorandum. Pl.'s 2nd Am. Comp. ¶¶ 42, 43. He further alleges that this decision represented the policy of the City and County of San Francisco. *Id.* at ¶ 42.

Hyland alleges that on March 12, 1989, in an attempt to silence him and to retaliate against him for his memorandum, Sweeny told a reporter to look into Hyland's past, presumably to uncover the felony conviction. *Id.* at ¶ 44. He further alleges that on March 14, 1989, LaPlante informed a supervising counselor that "Sweeny and I will make damn sure Hyland never gets another job in corrections or juvenile justice, if we can help it." *Id.* at ¶ 45.

Hyland alleges that in March 1989 Sweeny conceded that he was behaving vindictively, and that on March 20 1989, Sweeny told a probation officer that he intended to purchase a full page ad in a national correctional association publication in order to damage Hyland's reputation. *Id.* at ¶ 46. Hyland further alleges that unspecified defendants made false statements regarding Hyland that caused him to be denied a position as executive director of the San Mateo County Criminal Justice Coordinating

Council, and that were partially responsible for Hyland being terminated from a position with the Santa Clara County Department of Correction. *Id.* at ¶ 46.

Hyland alleges that on March 20, 1989, Sweeny telephoned the Governor's office and demanded that Hyland not receive a pardon, claiming that Hyland had released to the public confidential information regarding the juvenile justice system, a claim Hyland alleges Sweeny repeated on public television. *Id.* at ¶ 47. Hyland further alleges that in March or April 1989, Sweeny and LaPlante wrote a letter to the Governor's office, again demanding that Hyland not be granted a pardon, and that they convinced one of the judges who had previously supported Hyland's pardon to formally withdraw his support. *Id.* at ¶ 48. Hyland alleges that as a direct result of these actions, his pardon was denied on May 22, 1989, despite having been unanimously recommended by the California Supreme Court and the Governor's office review process. *Id.*

On April 13, 1989, Hyland filed a complaint with the City Civil Service Commission ("CSC"), alleging that he and Sweeny rigged an examination process to enable Sweeny to hire LaPlante as Director of Juvenile Hall. Stombler Decl. in Opp. to Pl.'s Mtn. for Partial S.J., Ex. D.

Hyland alleges that on May 4, 1989, he appealed to Judges Wonder and Hanlon to take action with regard to the allegedly retaliatory acts by Sweeny and LaPlante, but that both judges declined. Pl.'s 2nd Am. Comp. ¶ 49. He further claims that on May 11, 1989, defendant Walsh conspired with Judge Wonder to withhold evidence from

the CSC investigation into Hyland's complaint, and subsequently lied to the Commission. *Id.* at ¶¶ 53, 54.

Hyland alleges that after his termination at Juvenile Hall, he gained employment as a consultant under contract with the National Center on Institutions & Alternatives ("NCIA"), a non-profit organization which evaluates and recommends sentencing options to defense counsel. *Id.* at ¶ 56. He further alleges that as part of his job, his presence was required at a meeting in Juvenile Hall June 13 1989, and that LaPlante met him upon his arrival and denied him entrance, despite being aware of the reason for his presence. *Id.* at ¶¶ 59, 60. He alleges that as a direct result of his being unable to attend the meeting, NCIA terminated his employment on June 21, 1989. *Id.* at ¶ 61.

Hyland alleges that on July 11, 1989, the Superior Court Executive Committee met and ratified unspecified acts by defendants, thereby establishing such acts as City policy. *Id.* at ¶ 62. In August 1989, the CSC issued its ruling on Hyland's April complaint, finding no evidence of wrongdoing in the examination and hiring of LaPlante. Stombler Decl. ¶ 6.

Hyland further alleges that various defendants made a series of public statements designed to humiliate and harass him, and leading to denial of his applications for a position with the Juvenile Justice Commission, as Secretary to the Juvenile Probation Commission, and as Director of Community Programs with the JPD. Pl.'s 2nd Am. Comp. ¶¶ 63-70. Hyland alleges that in February 1990 he requested that defendant Jordan reverse the ban on his

presence at Juvenile Hall, but that Jordan denied this request in April 1990. *Id.* at ¶ 67.

On March 2, 1990, Hyland filed the original complaint in this matter in this court, and on May 17, 1990 he filed a First Amended Complaint, alleging a plethora of federal and state law claims. Hyland alleges that in June 1990 he requested that the Juvenile Probation Commission review Jordan's decision of April 1990, and that on July 11, 1990, the Commission ratified that decision, a move he alleges carried the weight of City policy. *Id.* at ¶ 69. On September 4, 1990, Hyland filed a complaint against the City and County of San Francisco with the City Controller's Office, detailing the events described above. Bullard Decl. in Supp. of Mtn. to Dis. or for S.J., Ex. A. On September 24, 1990, the Controller's Office notified Hyland by mail that his claim had been denied. *Id.* at ¶ 6.

On August 2, 1990, defendants moved in this court to dismiss Hyland's complaint. A hearing was held on defendants, motions on September 10, 1990, and on October 9, 1990, this court issued an order dismissing all of Hyland's federal claims with prejudice, and his state claims without prejudice. Hyland appealed, and the Ninth Circuit subsequently affirmed in part and reversed in part, in an opinion published as *Hyland v. Wonder*, 972 F.2d 1129 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2337 (1993).

The Ninth Circuit affirmed dismissal of Hyland's due process claims, but reversed on the first amendment claims, holding that Hyland's status as a volunteer did

not remove him from the ambit of first amendment protection. 972 F.2d at 1136. The court remanded to this court for determination of whether Hyland's memorandum was so disruptive as to justify his termination despite the protected content of his speech. *Id.* at 1140.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, summary judgment shall be granted:

> against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial . . . since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). The moving party bears the initial burden of identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. The burden then shifts to the nonmoving party to "go beyond the pleadings, and by [its] own affidavits, or by 'depositions, answers to interrogatories, or admissions on file' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex*, 477 U.S. at 324; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party").

While the moving party does not surmount its initial burden through conclusory allegations as to the state of the material on file, it is not required to "support its motion with affidavits or other similar material negating the opponent's claim." *Celotex*, 477 U.S. at 323. The moving party discharges its burden by showing that the non-moving party has not disclosed the existence of any "significant probative evidence tending to support the complaint." *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968).

The court's function on a motion for summary judgment is not to make credibility determinations. *Anderson v. Liberty Lobby*, 477 U.S. at 249. The inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion. *T.W. Elec. Serv.*, 809 F.2d at 631.

DISCUSSION

Because the issues raised in defendants' motion must necessarily be resolved prior to the issues in plaintiff's motion, the court will address the issues raised by defendants' motion first. Defendants have moved for summary judgment on each of Hyland's claims; the court will address them in turn.

I. Section 1983 Claims For Damages

Hyland alleges that defendants' actions constituted retaliation for exercise of his first amendment rights, in

violation of 42 U.S.C. section 1983, and seeks both damages and injunctive relief. The court will first address Hyland's claim for damages.

A. Qualified Immunity

In response to Hyland's section 1983 claims, defendants have pled as an affirmative defense qualified immunity from suit under *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). *See also Anderson v. Creighton,* 483 U.S. 635 (1987). Qualified immunity shields government officials engaging in discretionary activities from suit, insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable official would be aware. *Anderson,* 483 U.S. at 638.

Hyland has attacked this defense on a number of grounds. He first contends that defendants waived their immunity defense by failing to raise it as part of their initial motion to dismiss. Hyland next contends that his first amendment right against dismissal was clearly established at the time of defendants' alleged misconduct, such that the qualified immunity defense fails as a matter of law. Finally, Hyland contends that in order to prevail on their motion for summary judgment, defendants must allege that they were exercising discretionary functions when they acted against him.

Because the court finds Hyland's arguments unpersuasive as to these matters, for the reasons stated below, partial summary judgment will be entered for defendants on the section 1983 claims brought against them in their personal capacity for damages, as ordered below.

1. Waiver

Hyland contends that defendants have waived their qualified immunity defense by failing to raise it as part of their initial motion to dismiss. Hyland bases this contention on Rule 12(g) of the Federal Rules of Civil Procedure, which requires defendants to advance available Rule 12(b) defense and objection in one motion or thereby waive the right to raise them subsequently. Fed. R. Civ. P. 12(g).[3]

Hyland's argument that this rule somehow precludes defendants from now raising their affirmative defense of immunity is simply incorrect. Rule 12(g) only requires defendants to raise available Rule 12(b) defenses and objections at once, not any and all possible defenses. Fed. R. Civ. P. 12(g); *see also* 5 Wright & Miller, Federal Practice & Procedure: Civil § 1384 at 724-26 (1990). Therefore, the court finds as a matter of law that defendants have not waived their immunity defense.

2. Defendants' Entitlement To Immunity

As a threshold matter, *Harlow* qualified immunity protects government officials from section 1983 suits only when such officials are sued in their personal capacities – such immunity is irrelevant to official-capacity suits. *Brandon v. Holt*, 469 U.S. 464, 472-73 (1984).[4] Therefore, if defendants are entitled to qualified immunity at all, it can only be from those claims brought by Hyland for damages against them in their personal capacities.

3. Special Legal Standard: Summary Judgment Motions in Qualified Immunity Cases.

Harlow qualified immunity shields public officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would be aware. *Anderson*, 483 U.S. at 638. In delimiting the applicability of *Harlow* immunity in this circuit, the Ninth Circuit has held that "regardless of whether the [alleged] constitutional violation occurred, the officer should prevail if the right asserted by the plaintiff was not 'clearly established' or the officer could have reasonably believed that his particular conduct was lawful." *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991); *see generally Camarillo v. McCarthy*, ___ F.2d ___, 1993 WL 232352 (9th Cir. July 1, 1993).

In *Romero*, the Ninth Circuit held that the usual Rule 56(e) standard for summary judgment described above is necessarily altered by the policies underlying *Harlow* immunity. 931 F.2d at 628. The court therefore must apply the specialized summary judgment standard articulated in *Romero* as to this portion of defendants' motion.

When considering motions for summary judgment based on a qualified immunity defense, a court must make an initial determination as to whether the law at issue was clearly established at the time the complained of conduct occurred. *Id.* at 627. Such a determination is made through a three-part inquiry, in which the court must: (1) identify the specific right allegedly violated; (2) determine whether that right was so clearly established

as to alert a reasonable officer as to its parameters; and (3) ultimately determine whether a reasonable officer could have believed the conduct at issue was lawful. *Id.* at 627-28.

Contrary to Hyland's contention, "the plaintiff bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct," and, if that burden is met, defendants may still prevail if they prove that their actions were nonetheless reasonable. *Id.* at 627. If the court determines, as a matter of law, that the law was *not* clearly established, the inquiry ends and defendants are entitled to summary judgment. *Id.* at 628. If the court finds that the law *was* clearly established, the court must then determine, still as a matter of law, whether a reasonable officer would have known that her conduct violated those rights. *Id.*

In this case, the specific right allegedly violated is *now* quite clear – volunteers enjoy the same first amendment protections from retaliatory dismissal as municipal employees. The dispositive inquiry, however, is whether that right was so clearly established *at the time of the complained of conduct* that "a reasonable official would understand that what he [wa]s doing violate[d] that right." *Anderson*, 483 U.S. at 640. This inquiry is to be made solely as a matter of law. *Romero*, 931 F.2d at 628. The court finds that during the period relevant for Hyland's claim, it was far from clear that volunteers enjoyed the same first amendment protections from dismissal as municipal employees.

The Supreme Court has concluded that "the operation of this standard . . . depends substantially upon the

level of generality at which the relevant 'legal rule' is to be identified." *Anderson*, 483 U.S. at 639. That is, the right at stake must be sufficiently particularized so as to put defendants on notice of its content and parameters. *Id.* Thus, it is insufficient for Hyland to allege (as he does) that it was clearly established that government employees enjoy first amendment protections, or for Hyland to allege (as he does) that it was clearly established that private citizens in general may not be sanctioned by the government for engaging in protected first amendment activities. Rather, the sole relevant question is whether it was clearly established that local government volunteers enjoyed the same first amendment protection from dismissal as city employees.

To determine whether the right at stake was clearly established, "in the absence of binding precedent, a court should look at all available decisional law including decisions of state courts, other circuits and district courts. . . ." *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987). Hyland contends that it was clearly established at the time of defendants' actions that city volunteers shared the same first amendment protections as city employees. The court finds that the opposite conclusion is compelled.

As an initial matter, the history of this very case militates against finding that the first amendment rights of volunteers were clearly established. After canvassing all of the relevant decisional authorities in existence at the time of defendants' first motion to dismiss in August 1990, this court found as a matter of law that volunteers were not entitled to such protection. Not until the Ninth Circuit recognized such protection for the first time in its

decision on appeal in this case was the asserted right recognized at all in this circuit, much less clearly established. The fact that such a right is now clearly established is of no help to Hyland on his first amendment claim.

Further, while the case law cited by the Ninth Circuit, and by Hyland now, supports the Ninth Circuit's ruling, it by no means compelled that decision, and, in the view of this court, was not sufficiently established such that a reasonable official would be aware of the parameters of the right ultimately recognized in *Hyland*.

Twenty-five years ago, the Supreme Court held that an individual cannot be dismissed from public *employment* for speaking out on issues of public importance. *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968). As the Ninth Circuit noted in its opinion in *Hyland*, this right is an outgrowth of Supreme Court precedent dating back at least as far as World War II, establishing the constitutional tenet that "public officials may not deny or deprive a person of a governmental benefit or privilege on a basis that infringes her or his freedom of speech." 972 F.2d at 1134 (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

In finding that volunteers enjoy the same first amendment protections as public employees, the Ninth Circuit likened the benefits conferred upon volunteers to other government benefits. *Id.* at 1135. Importantly, however, in support of this proposition, the Ninth Circuit cited only one case on point, a 1979 Second Circuit case that held that a volunteer firefighter is entitled to first amendment protection against dismissal for speaking out

on matters of public concern. *Janusaitis v. Middlebury Volunteer Fire, Etc.*, 607 F.2d 17, 25 (2nd Cir. 1979).

Hyland's heavy reliance on *Janusaitis* to establish his rights as a government volunteer is misplaced, and not solely because at the time of Hyland's dismissal *Janusaitis* was a unique case from another circuit.[5] The facts of *Janusaitis* are readily distinguishable from Hyland's situation in meaningful respects, such that the Ninth Circuit's result in *Hyland*, while justified, was not compelled by a similar rationale. That is, the plaintiff in *Janusaitis* served in a volunteer fire department pursuant to a Connecticut statute specifically providing that volunteer firefighters are "construed to be employees of the municipality." *Id.* at 21 (citing Conn. Gen. Stat. § 7-314(a)). In addition, the volunteer firefighting company in that case operated under contract with the towns and cities it served. *Id.*

In contrast to the volunteer firefighters in *Janusaitis*, Hyland served under no special authorizing statute that defined his status, but rather solely as a personal assistant and confidante of defendant Sweeny. Unlike the firefighters, Hyland was under no contract with the city or even Juvenile Hall, but was retained solely at the caprice of Sweeny. Thus, Hyland's position possessed neither the statutory nor contractual obligations and rights that the firefighters in *Janusaitis* held. Not surprisingly, with the exception of the Ninth Circuit in *Hyland*, virtually every court that has cited to or applied *Janusaitis* has done so in the unique context of volunteer firefighters. *See, e.g. Versarge v. Township of Clinton New Jersey*, 984 F.2d 1359 (3rd Cir. 1993); *Yeager v. City of McGregor*, 980 F.2d 337 (5th Cir. 1993), *petition for cert. filed*, 61 U.S.L.W. 3836 (U.S. May 10, 1993) (No. 92-1836);

Adams v. Bain, 697 F.2d 1213 (4th Cir. 1982). Thus, Hyland's reliance on *Janusaitis* to establish his first amendment right against dismissal as a government volunteer is unconvincing.

The Ninth Circuit in Hyland bolstered its finding that Hyland was entitled to first amendment protection with a discussion of Supreme Court cases establishing that governmental benefits cannot be denied in retaliation for exercising first amendment rights. *Hyland*, 972 F.2d at 1135 (citing *Rutan v. Republican Party*, 497 U.S. 62, ___, 110 S.Ct. 2729, 2736 (1990) (promotion or transfer in government job); *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969) (welfare benefits); *Sherbert v. Verner*, 374 U.S. 398, 404-05 (1963) (unemployment benefits); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (tax exemptions); and *Thomas v. Carpenter*, 881 F.2d 828, 829-30 (9th Cir. 1989), *cert. denied*, 494 U.S. 1028, and *cert. denied*, 497 U.S. 1003 (job responsibilities)).

While this litany of cases is impressive, and certainly justifies the Ninth Circuit's recognition of first amendment rights for a volunteer, those cases, and others like them, all differ from Hyland's situation in one of two meaningful ways. That is, while it was clear from the case law that affirmatively granted government benefits cannot be denied in retaliation for exercising first amendment rights, nowhere was it clearly established in 1989 that volunteering in a government office is comparable to receiving such affirmative benefits. Further, while it was clear from the case law that government *employees* are entitled to first amendment protection against dismissal, nowhere was it clearly established in 1989 that a government *volunteer* possessed those same protections.

Because Hyland's rights against dismissal were not clearly established during the relevant time, the court's inquiry under *Romero* is at an end. The court finds as a matter of law that defendants are entitled to qualified immunity from suit against them for damages in their personal capacities. Accordingly, the court enters summary judgment for defendants on Hyland's section 1983 personal-capacity claims for damages, as ordered below.[6]

B. Section 1983 Official-Capacity Claims

Although Hyland's personal-capacity claims must fail as against defendants' *Harlow* immunity as a matter of law, Hyland's claims against defendants in their official capacities are not subject to qualified immunity. *See Brandon v. Holt,* 469 U.S. 464 (1984). However, suits against municipal officials in their official capacities are, in reality, suits against the municipality itself where the city has notice that it is the true defendant, and "an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham,* 473 U.S. 159, 166 (1985).[7] Accordingly, in considering Hyland's official-capacity claims against defendants, the court must treat the claims as if brought against the entities these officials serve.

1. Notice.

At the outset defendants contend that the city cannot properly be treated as a defendant in this action because it failed to receive sufficient notice under *Graham. Id.* Defendants base this contention on two grounds. First,

defendants claim that Hyland agreed to release two of the five entity defendants named in his First Amended Complaint, both by motion in this court and in briefing papers before the Ninth Circuit on appeal of the original dismissal.[8]

Defendants are correct that by motion filed on August 27, 1990, Hyland moved to dismiss the Juvenile Justice Commission, the Civil Service Commission, and individual defendant John Walsh. This court granted that motion at the September 10, 1990 hearing on defendants' motion to dismiss.[9] Because the court finds that the J.J.C. and C.S.C. (as well as defendant Walsh) are no longer proper defendants in this action, the court accordingly enters summary judgment for these three defendants on all claims, as ordered below.[10]

Defendants next contend that none of the official-capacity claims can be maintained because, in addition to dismissing two of the five entities, Hyland failed to name the remaining three entities (the Superior Court, J.P.D., and the J.P.C.) in his Second Amended Complaint. Defendants contend that this omission precludes a finding that the City had notice that it was the intended defendant. This contention is without merit. Hyland's Second Amended Complaint names all defendants in their individual and official capacities. By affirmatively dismissing the J.J.C. and C.S.C., he *is* precluded from bringing claims against those two defendants. However, given that Hyland did name the individual defendants in their official capacities in his Second Amended Complaint, his failure to name the remaining three entities cannot reasonably be construed to overcome the *Graham* presumption that suits against officials in their official-capacity

are to be treated as suits against the entity itself. Accordingly, the court finds defendants' argument that they failed to receive sufficient notice unpersuasive.

2. Official-Capacity/Municipal Liability

Municipalities can only be found liable under section 1983 where alleged misconduct is undertaken pursuant to city custom or policy. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121-22 (1988) (citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690-94 (1978)). Recognizing the often confusing issues involved in section 1983 municipal liability suits, the Supreme Court in *Praprotnik* distilled a fundamental test for determining what conduct qualifies as "city policy" under *Monell*: municipal defendants are liable under section 1983 only where the officials whose actions are at issue have final policy-making authority in the relevant area of city business. *Praprotnik*, 485 U.S. at 123 (citing *Pembaur v. Cincinnati*, 475 U.S. 469 (1986)). Whether a particular official rises to the level of a final policy-maker is purely a question of state law. *Praprotnik*, 485 U.S. at 124.

Hyland has alleged that various actions taken by defendants rise to the level of City policy. Specifically, he has alleged that on March 6, 1989 Judges Wonder and Hanlon acted in concert with defendants Sweeny and LaPlante to terminate him from his position as Special Assistant, and that this action constituted City policy. Pl.'s 2nd Am. Comp. ¶ 42. In addition, Hyland alleges that on July 11, 1989, the Superior Court Executive Committee met and ratified defendants' acts, thereby establishing City policy.[11] *Id.* at ¶ 62. Finally, Hyland alleges

that on July 11, 1990, the Juvenile Probation Commission met and ratified defendant Jordan's refusal to lift the ban on Hyland from Juvenile Hall. *Id.* at ¶ 69.

In order to prevail on the official-capacity claims, Hyland must prove that defendants' conduct rose to the level of City policy; further, defendants may be entitled to plead eleventh amendment immunity as to some or all of the official-capacity claims. Because the record contains insufficient evidence on these issues, and neither party has briefed them, the court orders the parties to submit further evidence and memoranda on these issues, as ordered below.

II. Section 1983 Claims For Injunctive and Declaratory Relief

In addition to seeking damages pursuant to his section 1983 claims, Hyland also seeks various declaratory and injunctive relief. Hyland first seeks a declaration that defendants' conduct violates Hyland's rights under the laws and Constitution of the United States. Hyland then prays for five specific preliminary and permanent injunctions: (1) an order reinstating Hyland to his former position as Special Assistant to the Chief Probation Officer of the San Francisco Juvenile Probation Department; (2) an order prohibiting defendants and their successors from barring his access to Juvenile Hall and from denying his appearance in cases before the San Francisco Juvenile Court; (3) an order requiring defendants to place Hyland at the top of the list of eligibles for any position for which he is qualified and applies for and to employ Hyland on a priority basis in that position in the Juvenile Probation

Department, Juvenile Probation Commission or Juvenile Justice Commission; (4) an order requiring defendants to withdraw all oral or written communications made to the Governor's office regarding Hyland's pardon, and requiring them to inform the Governor that those communications were made in violation of Hyland's rights and should not be considered; and (5) an order instructing the Governor's office to purge from Hyland's pardon file all references to post-February 24, 1989 communications of any sort which resulted from the complained of violations of Hyland's constitutional rights.

Defendants have moved for summary judgment on each of the requests for injunctive relief, arguing that the requested relief is impossible and/or moot.

The court declines defendants' invitation to determine the availability of injunctive relief at this stage of the proceedings. Whether the relief sought is proper will necessarily turn on the court's ultimate findings as to defendants' liability, with one exception. Hyland's final request for injunctive relief seeks an order instructing the Governor's office to purge Hyland's pardon file. This court cannot grant such relief, as it is beyond the power of this court to order an entity not properly before it to grant Hyland relief. Accordingly, as ordered below, the court will enter summary judgment for defendants on this specific request for relief, while withholding judgment on the remaining four requested injunctions, and other potential remedies, pending a determination of defendants' liability.

III. State Whistleblower Claim

Hyland alleges that defendants' conduct violates California's "whistleblower" statute, California Government Code sections 53296-53299. Defendants have moved for summary judgment on this claim on several grounds. The state law issues presented by this case are, apparently, issues of first impression under California law. For this reason, and because the court has ordered further briefing on Hyland's federal claims, the court declines to rule at this time on defendants' motion for summary judgment as to Hyland's state law claims, pending determination of whether his federal claims survive summary judgment.

IV. State & Federal Conspiracy Claims

Hyland alleges that no later than March 6, 1989 defendants entered into a conspiracy to deprive him of his first amendment rights under 42 U.S.C. section 1985(3) and to violate California Government Code section 53296-53299 (California's local agency whistleblower statute). Defendants contend that the conspiracy claims must fail as a matter of law because the underlying federal and state law claims fail on this summary judgment motion.

As discussed above, Hyland's federal and state law claims have not necessarily failed on this motion, so defendants' contention is premature. However, Hyland's federal conspiracy claim must fail as a matter of law. Under 42 U.S.C. section 1985, which provides a cause of action based on conspiracy to violate constitutional

rights, a plaintiff *must* allege class-based animus to prevail. *Griffin v. Breckinridge*, 403 U.S. 88, 103 (1971). Because Hyland has not alleged such class-based animus, and cannot do so under any reasonable reading of the factual record, his section 1985 federal conspiracy claim cannot be sustained. Accordingly, the court enters summary judgment for defendants on the federal conspiracy claim, as ordered below. The court declines to rule on defendants' motion for summary judgment on the state law conspiracy claim, pending determination of whether Hyland's section 1983 claims survive summary judgment.

V. Hyland's Motion for Partial Summary Judgment

Hyland has moved for partial summary judgment on the section 1983 issue of whether his memorandum was so disruptive as to outweigh his first amendment protections as articulated by the Ninth Circuit in *Hyland*. The court declines to rule on Hyland's motion at this time, pending resolution of the issues involved in defendants' Motion for Summary Judgment, because the issues presented by Hyland's motion may well become moot. The court will retain jurisdiction over Hyland's motion and rule on it when and if it becomes necessary to do so.

CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that:

(1) Defendants' Motion for Summary Judgment as to plaintiff's section 1983 claims for damages against defendants in their personal capacities is GRANTED;

(2) Defendants' Motion for Summary Judgment as to all of plaintiff's claims against the Juvenile Justice Commission, the Civil Service Commission, and defendant Walsh, is GRANTED;

(3) Defendants' Motion For Summary Judgment as to plaintiff's requested injunction against the Office of the Governor of California is GRANTED;

(4) Defendants' Motion for Summary Judgment on plaintiff's section 1985 federal conspiracy claim is GRANTED;

(5) the parties shall submit simultaneous memoranda, not to exceed fifteen (15) pages, on the issue of municipal liability as it applies to plaintiff's official-capacity claims, as explained above. These memoranda shall be filed on or before September 10, 1993, at which time the matter will be deemed to be submitted.

IT IS SO ORDERED.

Dated: SEP 2-1993

/s/ Marilyn Hall Patel
MARILYN HALL PATEL
United States
District Judge

ENDNOTES

1. Defendants have moved alternatively for dismissal under Federal Rule of Civil Procedure 12(b)(6) or for summary judgment under Rule 56; plaintiff has moved for partial summary judgment under Rule 56. Accordingly, the court will treat the motions as cross-motions for summary judgment under Rule 56.

2. Except as otherwise indicated by cite, all facts in this background are taken from the Statement of Undisputed Facts in Support of Plaintiff's Motion for Partial Summary Judgment and the Joint Statement of Undisputed Facts in Support of Defendants' Motion for Summary Judgment.

3. Rule 12(g) provides, in relevant part, that "[i]f a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection . . . " with certain limited exceptions. Fed. R. Civ. P. 12(g).

4. Qualified immunity does not bar suits for injunctive or declaratory relief, only suits for damages. *Pulliam v. Allen*, 466 U.S. 522, 536-43 (1984).

5. It is also worth noting that neither party thought *Janusaitis* sufficiently important to raise in their briefing papers during the initial motion to dismiss – not until after the Ninth Circuit issued its opinion on appeal citing *Janusaitis* did Hyland decide that *Janusaitis* clearly established his rights.

6. Hyland's final argument against defendants' motion on this ground emphasizes Supreme Court language in *Anderson* "providing government officials performing discretionary functions with a qualified immunity." 483 U.S. at 638. Hyland focuses on the word "discretionary", contending that defendants must allege that their actions were discretionary to be entitled to the immunity. This argument misreads the nature of qualified immunity. The Court in *Anderson* merely recognized that officials are

entitled only to *qualified* immunity for their discretionary actions, as opposed to the *absolute* immunity they receive for mandatory functions. It would indeed be remarkable if an official were immune from personal-capacity suits for actions taken within her discretion, but not for those mandated by her job. Fortunately, such illogic is not the law, and Hyland's contention to the contrary is simply untenable.

7. However, a municipality cannot assert the good faith or qualified immunity of its officers as a defense to suits in the official capacity. *Owen v. City of Independence, Mo.*, 445 U.S. 622, 638 (1980).

8. In addition to the individual defendants, the First Amended Complaint named as entity defendants the Superior Court of the State of California for the City and County of San Francisco ("Superior Court"), the San Francisco Juvenile Probation Department ("JPD"), the San Francisco Juvenile Probation Commission ("JPC"), the San Francisco Juvenile Justice Commission ("JJC"), and the San Francisco Civil Service Commission ("CSC").

9. The following exchange took place between the court and Hyland:

> THE COURT: As I understand it, there is some agreement to dismiss certain of the defendants. And so as to those then we won't be concerned; and we'll just deal with those who have a motion pending and against which there's been no dismissal. Correct?

> MR. HYLAND: That's correct your honor. And on the assurance from Ms. Giorgi that the discovery as to those people would be treated . . . in a normal fashion, I would move at this time that they be dismissed.
>
> THE COURT: Okay. Now, I'll deal with that in a separate order, so we can go on. Because the hour is late.

Trans. of Proc., September 10, 1990. Hyland contends that these defendants were never formally dismissed from the case, arguing that defendants never acceded to the discovery requests upon which the dismissal was conditioned, and further arguing that this court never issued an order dismissing these defendants.

While Hyland is correct that this court never issued a formal order on this matter, the court did rule on the motion from the bench and dismiss these parties on Hyland's own motion.

10. Defendants also point to language in Hyland's briefing papers before the Ninth Circuit on appeal of the original dismissal which purports to release these same defendants should the case be remanded for further action. 9th Cir. Reply Br. of App., at n.l. Because the court previously dismissed these defendants on Hyland's own motion, it is unnecessary, and the court declines, to decide if the purported "briefing-paper release" is binding.

11. Hyland does not specify which specific acts were ratified at this meeting, however.